No.

89-1412

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MELVYN KAUFMAN, 77 WATER STREET, INC., 77 WATER STREET ASSOCIATES, 127 JOHN STREET FEE ASSOCIATES, 127 JOHN STREET ASSOCIATES, 437 MADISON AVENUE FEE ASSOCIATES, and 437 MADISON AVENUE ASSOCIATES,

Petitioners,

– against –

THE CITY OF NEW YORK, THE ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK, EDWARD I. KOCH, in his capacity as Mayor of the City of New York, HARVEY W. SCHULTZ, in his capacity as Commissioner of the Department of Environmental Protection, and CHARLES M. SMITH, JR., in his capacity as Commissioner of the Department of Buildings,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MILTON S. GOULD
Counsel of Record

SHEA & GOULD
1251 Avenue of the Americas
New York, New York 10020
(212) 827-3000

Attorneys for Petitioners

March 6, 1990

QUESTIONS PRESENTED FOR REVIEW

1. Does a local law which requires petitioners to close their buildings and spend $50 million in order to remove a substance originally put in the buildings to comply with prior government mandates effect a taking of said private property?

2. Does this Court only recognize two types of takings: physical takings and regulatory takings, or should takings cases be analyzed on an *ad hoc* basis?

3. Are petitioners required to establish the elements previously set out in regulatory takings cases where the local law in question has economically harsh retroactive effects and is therefore materially different from the prospective land-use regulations which were challenged in the regulatory takings cases?

PARTIES TO THE PROCEEDING

The parties to the proceeding are set forth in the caption of the case.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully request that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Second Circuit, dated December 8, 1989, which affirmed

a final judgment of the United States District Court for the Southern District of New York. The District Court dismissed petitioners' federal constitutional claims pursuant to Fed. R. Civ. P. 12(b)(6) and dismissed petitioners' pendent state law claims for lack of subject matter jurisdiction.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals, dated December 8, 1989, and reported at 891 F.2d 446, appears in the Appendix hereto at pages A-1-A-4. The opinion of the District Court, dated May 24, 1989, and reported at 717 F. Supp. 84, is set forth at pages A-5-A-26.

JURISDICTION

The decision of the Court of Appeals was made and entered on December 8, 1989. This Court has jurisdiction to review the decision of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Complaint alleges that petitioners' property was taken by respondents without just compensation in violation of the Fifth Amendment to the Constitution of the United States.[1] This constitutional violation was caused by the enactment of New York City Local Law 76 of 1985 and its application to three office buildings previously constructed by petitioners.

These provisions of the Constitution and the Local Law are set forth at pages A-47-A-58 of the Appendix.

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[1] The Complaint contains other causes of action, which are not at issue in this petition.

STATEMENT OF THE CASE

This is case of first impression in which petitioners, the holders of fee or leasehold interests in three Manhattan office buildings, are challenging the constitutionality of New York City Local 76 of 1985 (the "Local Law") and the regulations purportedly promulgated pursuant thereto (the "Regulations"). The Local Law and Regulations mandate costly removal and/or encapsulation of asbestos which petitioners originally put in their buildings at respondents' direction. The Local Law and the Regulations place the entire financial burden associated with correcting the prior governmental error on petitioners and other private property owners. Complaint, ¶ 20, at A-30.

The governmental error derives from prior regulations in effect from 1958-1972. At that time, the City of New York (the "City") required petitioners herein and other builders of large office buildings to fireproof such buildings as they were being constructed. The City expressly limited the types of materials which could be used for this required fireproofing to asbestos and cementitious material. Between 1968 and 1971, petitioners constructed the three office buildings at issue here. Petitioners used asbestos, as required by the City, to comply with the City's rigid fireproofing mandates in existence at the time the buildings were being constructed.

Apparently at the same time that these buildings were under construction, however, the City was already preparing to reverse itself and prospectively prohibit the use of asbestos in new construction. In late 1971, the City imposed such a prospective ban, effective February 1972. Thus, the City, in all probability[2], had

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[2] By virtue of the dismissal of their complaint by the District Court, petitioners have been unable to take any discovery to establish when the City first considered a ban on asbestos; however, one of the three buildings at issue here, 127 John Street, was being built in 1971, and in late 1971, the City issued its ban on asbestos, a ban which, petitioners submit, was not decided upon overnight.

been considering a ban on asbestos during the very same years (1968-1971) it was requiring petitioners to spend millions of dollars to use asbestos in the three buildings at issue here.

In 1985, the City changed course for a second time. In that year, the City passed Local Law 76 which, together with the Regulations promulgated pursuant thereto, has required, and will in the future require, petitioners to spend millions of dollars and to close portions of their buildings in order to remove or encapsulate the asbestos which petitioners originally installed pursuant to the City's prior mandates. The City, in the proceedings below, submitted no proof that it enacted Local Law 76 in 1985 based on new information not available to it in 1968-1972. Thus, Local Law 76 was nothing more than an arbitrary act of political expediency, at the expense of a group of building owners, such as petitioners, who were unlucky enough to have complied with prior City edicts.

By the time the asbestos work is finished, every floor of each building at issue will have been closed for significant periods of time to allow for the City-mandated removal or encapsulation of the asbestos. Petitioners will effectively have to close the entire three buildings to undo the City's mistake.

This remedial work will not only physically obstruct petitioners' use of the buildings, but it will also cost petitioners approximately $50 million, an amount equal to approximately 50 percent of the assessed values of the three buildings.[3]

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[3] Since the statutory and regulatory scheme at issue went into effect, petitioners have had to close portions of the three buildings at issue here for a combined total of approximately 1,200 days and spend $8,494,536, solely to remove or encapsulate the asbestos that the City required and approved. In addition, petitioners have already lost $1,569,033 in rent due to the building closings. Complaint, ¶¶ 35-37, at A-35-A-36; Affidavit of Robert Kaufman in Opposition to Motion to Dismiss, ¶ 2, at A-44. Petitioners will continue to be injured by the challenged law and regulations since asbestos remains on other floors in the three office buildings at issue. Complaint, ¶¶ 35-37,

(Footnote continued)

On July 22, 1988, petitioners commenced this action by filing the Complaint (A-27-A-43). In the complaint, petitioners asserted that the Local Law and Regulations violated the takings and due process clauses of the United States and New York State constitutions, and asserted other causes of action under New York State law. The basis for subject matter jurisdiction was 28 U.S.C. § 1331. By Notice of Motion dated September 9, 1988, respondents moved to dismiss the complaint for failure to state a claim upon which relief can be granted. On May 24, 1989, the District Court for the Southern District of New York dismissed the federal takings and due process claims for failure to state a claim. A-5-A-26. The District Court also dismissed the state law claims for lack of subject matter jurisdiction.

Petitioners appealed to the Court of Appeals for the Second Circuit, which affirmed the judgment of the District Court. The Court of Appeals, in its decision, adopted the opinion of the District Court, writing that:

> In light of the careful and comprehensive opinion of the district judge, we see no reason for unnecessarily adding to the pages of the Federal Reporter, 2d Series, and we affirm substantially for the reasons given in the judge's opinion.

891 F.2d at 447, at A-4.

The writ of certiorari should be granted because this case presents novel questions of takings jurisprudence which have enormous constitutional implications. New York City, believing that it can do whatever it wants whenever it wants at no cost to itself, has required petitioners to pay the full and substantial cost of correcting a prior City error. By endorsing the City's cavalier actions, the courts below decided federal questions in ways which conflict with applicable decisions of this Court.

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at A-35-A-36. Petitioners will be required to close their buildings for a combined total of approximately 3,450 days and spend $32,354,696 to remove the remaining asbestos. Complaint ¶¶ 35-37, at A-35-A-36; Kaufman Affidavit, ¶ 3, at A-45. The future asbestos-related building closings will cost plaintiffs an estimated $8,445,360 in lost rent. Complaint, ¶¶ 35-37, at A-35-A-36.

ARGUMENT

Petitioners argued below that the City's actions effected an unconstitutional taking of private property because the actions have caused, and will continue to cause, temporary physical occupations of petitioners' property, and at the same time have inflicted, and will continue to inflict, major economic injuries on petitioners.

Thus, petitioners put forth a takings claim which does not fit neatly into the purely "physical" or purely "regulatory" categories of takings. The instant takings claim contains both physical and non-physical elements. Further, another key component of petitioners' takings claim is that petitioners must undergo the aforesaid physical occupation and pay the huge costs required to remove the asbestos in order to correct a prior City error which caused the petitioners to put the asbestos in their buildings in the first place.

The courts below ruled in essence that even though petitioners put asbestos in their buildings because of prior governmental edicts, petitioners could not challenge the City's 1985 decision to compel petitioners to spend $50 million to correct the prior City error which required them to use the asbestos. This was so, the courts held, notwithstanding the fact that (a) the City apparently acted in 1985 to require the removal of the asbestos on the very same information it had in 1968-1971, when it directed the use of the asbestos in petitioners' buildings, and (b) the City apparently mandated use of the asbestos while it knew it was planning to ban its use. Now, the City is requiring petitioners to allow their premises to be occupied and to pay the huge costs of removing the asbestos which was put in at the direction of the City apparently at the very time the City was considering banning its use.

Petitioners argued below that their reliance on prior governmental directives was indeed relevant to takings analysis under the Supreme Court rulings in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), and *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984). Petitioners also contended that their takings claim should

be analyzed on an "*ad hoc*" basis, and should not be limited to an analysis under this Court's "regulatory takings" doctrine, because, as this Court has held, there is no "set formula" for the analysis of takings cases. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124, *reh'g denied*, 439 U.S. 883 (1978).

The Courts below rejected both of these critical arguments by petitioners. On the first question, reliance on prior City edicts directing the use of asbestos, the District Court held:

> Contrary to plaintiffs' suggestion, compliance with the City's prior fireproofing requirements does not remove this case from the established case law regarding the government's ability to restrict use of property for the public benefit.

District Court Opinion, at A-24. The Second Circuit, by adopting the District Court's opinion, created a conflict between the circuits, and between itself and this Court, on the relevance of reliance on prior governmental directives in takings analysis. *See* pp. 8-10, *infra*.

On the second question, whether the instant case was simply a "regulatory takings" case, the District Court held that the Local Law at issue here is no more than "a regulation on the use of property," A-21, even though the Local Law at issue here does not simply prohibit *future* uses of property, as in the typical regulatory takings case, but instead imposes costly *retroactive* obligations on petitioners who must spend millions of dollars to remove asbestos in order to be able to continue to use their buildings as intended. Accordingly, the District Court and Court of Appeals held that petitioners were handcuffed by the regulatory takings doctrine which was established in cases involving prospective zoning and land-use regulations, which doctrine forces property owners to show they can make no economically viable use of their land under the challenged land-use or zoning regulation. The instant action is simply not a land-use or zoning case. By forcing petitioners to prove a takings claim using this inapposite line of cases, the lower courts improperly

expanded and misapplied the doctrine of those *prospective* land-use cases beyond what was intended by this Court, and also ignored this Court's teachings that taking cases are "*ad hoc*" and are not to be analyzed under any "set formula." *Penn Central*, *supra*, 438 U.S. at 124.

In the instant suit, the City's actions go far beyond a traditional regulatory takings case involving a challenge to a *prospective* land-use or zoning law. When the character of the governmental action is a land-use or zoning law, merely prohibiting certain potential uses of a property in the future, there will be a "taking" only if the property owner is denied all "economically viable" use of his property. *Agins v. City of Tiburon*, 447 U.S. 255 (1980). Petitioners never alleged that they were denied all "economically viable" use of their property. Petitioners have alleged, however, that the Local Law will impose a severe, $50 million, financial burden on them. Further, this burden is *retroactive*, not *prospective*, as it is in the regulatory takings cases, since here petitioner must undertake the burden of removing or encapsulating the asbestos, a burden which is particularly inequitable because the City is solely to blame for the presence of the substance it now demands petitioners remove or encapsulate.

Research reveals no reported cases where the courts have held that such retroactive legislation by a state or municipal authority must be challenged under the regulatory takings doctrine. Thus, in the instant case, petitioners should not be required to prove the complete destruction of their real property, since the interference by the City with their property rights is decidedly more pronounced than in a routine, wholly prospective, land use or zoning case.

This is particularly true because this Court has made it clear that reliance on prior governmental actions is relevant in constitutional takings analysis, a point ignored by the courts below. The District Court wrote simply that "compliance with the City's prior fireproofing requirements does not remove this case from the established case law regarding the government's ability to

restrict the use of property for the public benefit." District Court Opinion, at A-24. By so ruling, the court ignored the holdings of this Court and other courts of appeals that reliance by the property owner on prior governmental acts is without question relevant to takings analysis.

In *Kaiser Aetna v. United States*, *supra*, 444 U.S. at 178-179, this Court expressly held that one factor in its finding that there was a taking was prior conduct by government on which the property owner relied. Moreover, in *Kaiser Aetna* this Court decided in favor of a property owner who was relying on the mere acquiescence or implied consent of the government. Here, on the other hand, petitioners relied on the prior *affirmative requirements* of New York City to install asbestos as a fireproofing material. Likewise, in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011 (1984), this Court held in a takings case that an "explicit governmental guarantee formed the basis of a reasonable investment-backed expectation."

Courts of Appeals in other circuits have also held reliance on prior governmental decisions to be highly relevant in the analysis of takings claims. *Wheeler v. City of Pleasant Grove*, 664 F.2d 99 (5th Cir. 1981), *cert. denied*, 456 U.S. 973 (1982), was one such case. In *Wheeler*, the local government granted a building permit for an apartment complex to the plaintiffs. As the Court observed, "in reliance on the permit, the plaintiffs initiated preparatory work." 664 F.2d at 100. Following a public "uproar" about the granting of the permit, the city passed a new ordinance, "which forbade the construction of new apartments. The city then prohibited the plaintiffs from proceeding with construction." *Id.*

The Fifth Circuit Court of Appeals, affirming the District Court's finding that a taking had occurred, wrote that "if a regulatory undertaking is confiscatory in nature, it is a taking." *Id.* Significantly, the *Wheeler* Court distinguished this issue from the separate question of whether "the city's purpose in enacting the measure was . . . rational." In other words, an otherwise proper and rational governmental action could still be a

taking because of its retroactive effect on property owners who relied on prior governmental actions. *Id.*

The Fourth Circuit has also endorsed the *Wheeler* "confiscatory taking" doctrine. *See G.T. Scott v. Greenville County*, 716 F.2d 1409, 1421 (4th Cir. 1983). And in a recent case, *A.A. Profiles, Inc. v. City of Fort Lauderdale*, 850 F.2d 1483 (11th Cir. 1988), *cert. denied*, 109 S. Ct. 1743 (1989), the Eleventh Circuit reaffirmed the *Wheeler* rule. Therefore, the District Court and Second Circuit decisions in the instant case, which summarily rejected petitioners' argument that they relied on prior government edicts, stand in conflict with rulings of this Court and other courts of appeals. The writ of certiorari should therefore be issued so that this Court can settle this conflict.

Further, in ruling that petitioners could not assert a taking other than a pure "physical" or pure "regulatory" taking, the Court of Appeals acted contrary to the long-established mandate of this Court that all takings cases are *ad hoc*, and, therefore, there are not simply two neat and distinct categories of takings. Indeed, rather than separate the physical and non-physical aspects of the Local Law, as the District Court did in its analysis, the courts below should have *combined* and analyzed as a whole all of the intrusive aspects of the Local Law and thereby considered this complaint as a whole on an "*ad hoc*" basis. This is so because, as this Court has held:

> [W]e have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case.'

Penn Central, 438 U.S. at 124. This Court has never held that only some relevant factors should be considered in takings analysis, in isolation from the other factors involved. Here, the District Court ruled that there was no pure "physical" taking and no pure "regulatory" taking (*see* District Court Opinion, at A-21-A-24) and the Court refused to combine the physical and non-physical effects of the Local Law and Regulations.

Petitioners claim that there was indeed a taking, given the impact of all the relevant factors, including that the petitioners are being required to pay the cost of correcting a prior government error.

At no time has this Court held that there are only two distinct types of takings – physical and regulatory. And at no time has this Court held that if one aspect of a law's impact is not sufficient in and of itself to constitute a taking, then that aspect should be completely ignored and discarded when considering the effect of other aspects. The District Court did that here by dismissing completely the physical impact of the Local Law on petitioners' property. Rather, the Supreme Court has recognized that takings analysis is always "*ad hoc* [and] factual." *Penn Central*, at 124.

This Court has expressly stated that it has developed no " 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Penn Central*, 438 U.S. at 124. Noting that takings inquiries are "essentially *ad hoc* [and] factual," this Court has stressed that several factors are of "particular significance" to takings analysis. *Id.* at 124. Specifically, this Court has stated:

> The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations . . . [s]o too is the character of the governmental action.

Id.

The courts below gave short shrift to the Local Law's impact on petitioners' "distinct investment-backed expectations," a factor identified by this Court in *Penn Central* to be of "particular significance" in takings cases. 438 U.S. at 124. When petitioners constructed the three large urban office buildings at issue, they did not expect to have to seal off the buildings and pay millions

of dollars to remove a major construction material used at the City's direction. *See* Complaint, ¶¶ 31-33; A-34-A-35. The Local Law, therefore, directly and drastically interferes with petitioners' distinct investment-backed expectations.

In addition to (1) the oppressive financial burdens inflicted on the petitioners by the City, (2) the interference with petitioners' distinct investment-backed expectations, and (3) the reliance on prior City requirements, which were ignored by the courts below, there is an additional factor – physical interference with the property – weighing in petitioners' favor and distinguishing this case from a routine "regulatory" taking.

The Local Law and Regulations physically interfere with petitioners' use of their properties in two ways. First, the Law and Regulations affirmatively require petitioners to seal off and close portions of their buildings for long periods of time in order to remove or encapsulate asbestos. Second, the Law and Regulations force petitioners to turn over control of their buildings (while undergoing asbestos treatment) to a group of City-certified asbestos treatment workers. Petitioners, thus, are forced to submit to the occupation of their buildings for extended periods of time by outside parties licensed by the City. The instant case therefore involves a physical interference with plaintiffs' buildings, along with the additional major, inequitable financial penalties imposed on petitioners, all to rectify prior mistakes by the City in requiring the use of asbestos.

It makes no difference under this Court's rulings whether government agents themselves are padlocking the doors, whether third parties (such as asbestos contractors) are doing the physical taking, or whether the property owner himself is closing the building under orders from the government. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Kaiser Aetna*, 444 U.S. at 164. The key inquiry is whether there is a government-mandated physical interference with the owner's use of his property, and there is such government-mandated physical interference here. As this Court stated in *Loretto*:

> A permanent physical occupation authorized by state law is a taking without regard to whether the State . . . is the occupant.

458 U.S. at 433, n.9. In *Loretto*, the Court held that there was a taking where the state ordered certain building owners to allow private cable television companies to install cables on the buildings. It was irrelevant that it was not government or the public at large physically invading the property.

In *Kaiser Aetna*, *supra*, where government, by statute, merely authorized members of the public to use a private entity's waterway, the Court held that there was governmental action "far beyond ordinary regulation," "an actual physical invasion," and a taking. *Kaiser Aetna*, *supra*. In *Kaiser Aetna*, the Court held that governmental action which required a property owner to allow the public to use its private marina was indeed a governmental taking.

The constitutional irrelevancy of the identity of the persons who actually carry out the physical interference with the property owner's use is directly related to the doctrine that courts should focus "on the owner's loss, not the taker's gain," when analyzing takings claims. *United States v. Causby*, 328 U.S. 256, 261 (1946). Thus, the constitutional taking is the obstruction to the property owner, caused by some governmental action. This action by government can be the simple passage of a statute, and there need not be actual physical intrusion by government agents themselves. *Loretto*; *Kaiser Aetna*. In the instant action there is actual physical intrusion by asbestos contractors licensed by the City, whose presence is required by City statute to remove the asbestos which the City required to be put into the private property in the first place.

Moreover, this Court has held that "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." *Loretto*, 458 U.S. at 426. The courts below erroneously ruled that there was no taking of petitioners' property. In so ruling, these lower courts

decided an important question of federal law in a way which conflicts with applicable decisions of this Court. Surely, government cannot in effect dump an allegedly hazardous substance on private property and later force the property owner to seal off the property and pay government-certified third parties to remove the substance at a cost of $50 million. The prior City mandate is solely to blame for the presence of asbestos on petitioners' properties; as a result, petitioners should not be forced to seal off their properties and remove it, at a cost of $50 million, without just compensation from the government.

CONCLUSION

Petitioners respectfully submit that this Court should take heed of its long-established holding that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). Here, the Local Law has "gone too far" by forcing the property owner to incur substantial expenses to undo a City error and by physically interfering with the use and enjoyment of the buildings. Since takings analysis must be "*ad hoc* [and] factual," *Penn Central*, *supra*, at 124, the courts below gave petitioners short shrift and ignored the mandates of this Court. This Court should issue a writ of certiorari and address the broad questions about governmental power and private property rights raised herein. Otherwise, the doctrine of law applicable to regulations on prospective land development will have been successfully expanded to punish innocent property owners who have suffered the misfortune of having fully and faithfully complied with prior, ill-founded, governmental edicts.

Respectfully submitted,

MILTON S. GOULD
SHEA & GOULD
Attorneys for Petitioners
1251 Avenue of the Americas
New York, New York 10020
Telephone: (212) 827-3000

Of Counsel:

ROBERT J. WARD
JONATHAN M. LANDSMAN

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 339 August Term 1989

Argued: November 13, 1989 Decided: December 8, 1989

Docket No. 89-7621

---------- X

MELVYN KAUFMAN, et al.,

Plaintiffs-Appellants,

- against -

THE CITY OF NEW YORK, et al.,

Defendants-Appellees.

---------- X

Before: FEINBERG and MESKILL, Circuit Judges, and COFFRIN, District Judge.*

Appeal from judgment of the United States District Court for the Southern District of New York, Robert J. Ward, J., granting defendants-appellees' motion to dismiss federal constitutional claims and dismissing pendent state law claims.

Affirmed.

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* Honorable Albert W. Coffrin, Senior United States District Judge for the District of Vermont, sitting by designation.

MILTON S. GOULD, New York, NY (Shea & Gould, Robert J. Ward, Jonathan M. Landsman, of Counsel), for Plaintiffs-Appellants.

ELIZABETH S. NATRELLA, New York, NY, Assistant Corporation Counsel of the City of New York (Peter L. Zimroth, Corporation Counsel of the City of New York, Pamela Seider Dolgow, Assistant Corporation Counsel, Julian Bazel, Assistant Corporation Counsel, of Counsel), for Defendants-Appellees.

PER CURIAM:

Plaintiffs-appellants, the holders of fee or leasehold interests in three Manhattan office buildings, appeal from a judgment of the United States District Court for the Southern District of New York, Robert J. Ward, J., dismissing their complaint on the motion of defendants-appellees City of New York, the Environmental Control Board of the City of New York, Edward I. Koch, in his capacity as Mayor of the City of New York, and the Commissioners of the Department of Environmental Protection and the Department of Buildings. The district court dismissed plaintiffs' federal constitutional claims on the merits, and their pendent state claims for lack of subject matter jurisdiction.

Appellants challenge the constitutionality of New York City Local Law No. 76 of 1985 and related regulations (Local Law 76).[1] During 1968-1971, the period when the buildings in issue

[1] Local Law 76 was amended in December 1986 by Local Law No. 80 of 1986. The main provisions of Local Law 76 as amended have been codified in the Administrative Code §§ 24-146.1 and 27-198.1.

were constructed, appellants, in compliance with the city's prior fireproofing requirements, installed asbestos, which was then one of two city-approved fireproofing materials. In 1971, the City banned the use of sprayed asbestos in building construction, and in 1985 Local Law 76 as enacted. That law requires, among other things, that the presence and condition of asbestos be ascertained before any building alteration or demolition is performed; that asbestos be removed or encapsulated if such work will cause asbestos to become airborne; and that all asbestos abatement activities be conducted in accordance with approved safety procedures by people with appropriate training and certification. Local Law 76 does not require that building owners remove asbestos that is undisturbed or that will not be disturbed by alteration or demolition.

Appellants contend that the challenged law effects a regulatory taking of their property without just compensation by requiring them to pay the costs of the City's past mistakes and by rendering their office buildings unfit for their intended purpose unless appellants incur very substantial expenses. In addition, appellants argue that Local Law 76 effects a physical taking, by requiring them to seal off and close portions of their buildings. Appellees reject the characterization of Local Law 76 as a physical taking, since the law only regulates the uses to which appellants' property can be put, and contend that the regulatory taking claim also fails, since appellants' have not alleged that they are no longer able to operate their buildings at a profit.

Appellants also argue that Local Law 76 (a) offends substantive due process by retroactively requiring them to bear all of the costs of removing asbestos originally installed at the City's direction, and (b) denies them procedural due process, because of the improper delegation of governmental power to private asbestos investigators, whose certifications determine whether a project is subject to the requirements of Local Law 76, and because of the absence of any provision for a hearing or appeal from an adverse determination to a neutral governmental officer. With respect to the substantive due process claim, appellees

respond that the City can require property owners to comply with new safety measures that are rationally related to its legitimate interest in public health and safety, even where compliance entails costly improvements to existing, lawfully constructed buildings. With respect to the procedural due process claim, appellees maintain that state delegations of power do not implicate federal constitutional concerns, and that appellants have adequate administrative and judicial remedies, including recourse to the state courts.

Judge Ward dealt with all of appellants' constitutional claims in his opinion, which is reported at 717 F. Supp. 84. Appellants raise other, less substantial, arguments, which we need not discuss. We have considered them, and they are unpersuasive. In light of the careful and comprehensive opinion of the district judge, we see no reason for unnecessarily adding to the pages of the Federal Reporter, 2d Series, and we affirm substantially for the reasons given in the judge's opinion.

Judgment affirmed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MELVYN KAUFMAN, 77 WATER STREET, INC., 77 WATER STREET ASSOCIATES, 127 JOHN STREET FEE ASSOCIATES, 127 JOHN STREET ASSOCIATES, 437 MADISON AVENUE FEE ASSOCIATES, and 437 MADISON AVENUE ASSOCIATES,

Plaintiffs,

- against -

THE CITY OF NEW YORK, THE ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK, EDWARD I. KOCH, in his capacity as mayor of the City of New York, HARVEY W. SCHULTZ, in his capacity as Commissioner of the Department of Environmental Protection, and CHARLES M. SMITH, JR., in his capacity as Commissioner of the Department of Buildings,

Defendants.

OPINION

88 Civ. 5124 (RJW)

APPEARANCES

SHEA & GOULD
1251 Avenue of the Americas
New York, New York 10020

MILTON S. GOULD
ROBERT J. WARD
JONATHAN M. LANDSMAN
Of Counsel

Attorneys for Plaintiffs

CORPORATION COUNCIL FOR THE CITY OF NEW YORK
100 Church Street
New York, New York 10007

GABRIEL TAUSSIG
ALBERT G. FREDERICKS
JULIAN BASEL
Of Counsel

Attorneys for Defendants

WARD, District Judge.

Plaintiffs have challenged the laws and regulations enacted and administered by defendants regarding asbestos removal or encapsulation during building alteration, renovation, or demolition work on the grounds that these laws and regulations, *inter alia*, violate substantive due process, procedural due process and constitute a taking without just compensation under the Fifth and Fourteenth Amendments to the United States Constitution. Plaintiffs also assert several pendent state law claims. Defendants have moved to dismiss the federal claims in the complaint pursuant to Rule 12(b)(6), Fed. R. Civ. P. and to dismiss the pendent state claims for lack of subject matter jurisdiction under Rule 12(b)(1), Fed. R. Civ. P. For the reasons that follow, the motion is granted and the complaint is dismissed.

BACKGROUND

Plaintiffs are the holders of fee or leasehold interests in three Manhattan office buildings built between 1968 and 1971.[1] Defendants include the City of New York (the "City"), the Environmental Control Board of the City of New York, Mayor Edward I. Koch, and the Commissioners of the Department of Environmental Protection ("DEP") and the Department of Buildings ("DOB").

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[1] These office buildings are located at 77 Water Street, 437 Madison Avenue, and 127 John Street.

The City requires new office buildings to contain fireproofing material. Prior to 1971, asbestos-containing material, along with cementitious material, were the two types of material approved by the New York City Board of Standards and Appeals ("BSA") for fireproofing in steel deck structural steel office buildings, the type of buildings involved in this case. Plaintiffs used asbestos-containing material in the construction of their buildings in order to comply with the fireproofing requirements. In 1971, in response to the public health hazards associated with airborne asbestos, the City banned the use of sprayed asbestos in building construction, effective February 1972. Administrative Code of the City of New York ("Administrative Code") §24-146(b).

In December 1985, the Council of the City of New York enacted Local Law No. 76 of 1985 ("Local Law 76").[2] This law amended the City Air Pollution Control Code to address the public health hazards posed by airborne asbestos. The Declaration of Legislative Findings and Intent to Local Law 76 states:

> [t]he council hereby finds that exposure to airborne asbestos fibers and particles in the air has been linked by reputable medical and scientific authorities to a significant increase in the incidence of diseases such as asbestosis, bronchogenic carcinoma, mesotheliom _ and other malignancies and that substantial amounts of materials containing asbestos have been used in buildings for fireproofing, insulation, soundproofing, decorative and other purposes. The council further finds that the predominant cause of asbestos becoming airborne is due to the performance of building renovation and demolition without adequate adherance [sic] to procedures for safeguarding workers and the general public . . . ."

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[2] Local Law 76 was amended in December 1986 by Local Law No. 80 of 1986. The main provisions of Local Law 76 as amended have been codified in the Administrative Code §§ 24-146.1 and 27-198.1.

Local Law 76, § 1. Accordingly, Local Law 76 was designed to provide a regulatory framework that would ensure building alteration or demolition work would not cause asbestos to become airborne and thereby threaten the public health.

Local Law 76 requires the presence and condition of asbestos be ascertained before any building alteration, renovation or demolition work is performed. If asbestos is found, it must either be sealed in place or removed if the work would disturb it and cause it to become airborne. The law also requires that all asbestos abatement activities be conducted in accordance with approved safety procedures and be performed by persons with appropriate training and certification. The law does not require the sealing or removal of any asbestos which is not being disturbed or will not be disturbed by the alteration or demolition work.

Pursuant to Local Law 76, before the DOB will approve any plans for building alteration, renovation or demolition work, the applicant must file either a certification prepared by an "asbestos investigator" that the work to be performed will not constitute an "asbestos project", or submit an "asbestos inspection report" which sets forth the condition of the building in relation to the presence and condition of asbestos. Administrative Code §27-198.1(a).[3]

An asbestos investigator must be certified by the DEP as having "satisfactorily demonstrated his or her ability to identify the presence and evaluate the condition of asbestos in a building and structure." Administrative Code § 24-146.1(a)(3). An

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[3] The DOB is empowered to examine and approve plans for the construction and alteration of buildings and to require such work be performed in accordance with other City laws and regulations. Charter of the City of New York ("City Charter") §645(b)(1)-(2). An owner of a building is responsible for maintaining the building in a safe condition and his or her authorization is required for DOB approval of any building alteration of demolition work. Administrative Code §§ 27-128, 27-140, 27-142, 27-151. In addition, in order to receive DOB approval for alteration or demolition work, the plans for such work must be prepared by, or under the supervision of, a qualified professional. Administrative Code § 27-140.

"asbestos project" is defined as any work in connection with the alteration, renovation, modification or demolition of a building which will disturb more than two hundred sixty (260) linear feet or one hundred sixty (160) square feet of friable asbestos containing material, or lesser amounts which the DEP may establish by regulation. Administrative Code §24-146.1(a)(8). The law defines "asbestos-containing material" as asbestos or any material containing more than one percent (1%) asbestos by weight, and such material is defined as "friable" if it can be "crumbled, pulverized or reduced to powder when dry, by hand pressure". Administrative Code §24-146.1(a)(4),(9).

Certification that the building work does not constitute an asbestos project removes the work from the requirements of Local Law 76. The asbestos inspection reports do not remove the planned work from the regulatory scheme and need not be prepared by an asbestos investigator.

The task of regulating asbestos abatement activities was delegated by Local Law 76 to the DEP with directions to promulgate regulations regarding the health and safety of the public and persons who work at or in the vicinity of an asbestos project. Administrative Code §24.146.1(c). in March 1987, the DEP adopted regulations implementing the requirements of Local Law 76 concerning asbestos removal or encapsulation. These regulations were subsequently amended in May and August 1987 and January and May 1988. DEP Regulations §§ 8000 *et seq*. In December 1986, the DEP adopted regulations governing the training and certification of asbestos investigators, asbestos handlers, and asbestos handler supervisors. These regulations were subsequently amended in January, June and August 1987 and May 1988. DEP Regulations §§8110-8146.

The DEP regulations regarding asbestos investigators provide that an applicant must be either a professional engineer, registered architect, certified industrial hygienist or safety professional, graduate with a bachelor's degree in engineering, architecture, environmental health science or a related field or an individual with extensive experience in asbestos investigation. DEP Regulations § 8140. In addition, the applicant must

successfully complete a minimum course of instruction on various aspects of asbestos. DEP Regulations §§ 8140, 8115.

Local Law 76 provides that owners, lessees and occupants of premises are responsible for the lawful conduct of any work subject to the law. Civil penalties exist for the violation of the provisions of Local Law 76, or any order, rule or regulation promulgated thereunder and certain fees are established for the approval of asbestos related projects. Administrative Code 24-178(b)(5)(i). The parties do not contest that compliance with these procedures in removing asbestos can be costly.[4]

In May 1988, Local law No. 46 of 1988 ("Local Law 46") amended the Administrative Code to allow for individual variances from the requirements of the Local Law 76 and the regulations for specific asbestos projects. Variances may be granted if adequate proof is presented that compliance with particular requirements related to asbestos removal or encapsulation would impose unreasonable hardship. In granting a variance, such conditions as the policies of the Administrative Code require may be imposed. Local Law 46 at §7.[5]

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[4] Plaintiffs allege they have already spent $5,592,083 at 77 Water Street, $2,176,746 at 437 Madison Avenue and $722,707 at 127 John Street to remove asbestos containing material in compliance with Local Law 76. Complaint, filed July 22, 1988, at ¶¶ 35-37. Plaintiffs also allege that future compliance will cost approximately $2,954,318 at 77 Water Street, $18,864,238 at 437 Madison Avenue, and $10,536,140 at 127 John Street. *Id.* In addition, plaintiffs claim they will suffer a significant loss of rental income from each building due to compliance with the law. *Id.* Finally, plaintiffs assert that Local Law 76 has increased the cost of securing mortgages for their properties. *Id.* at ¶ 38.

[5] Section 7 of Local Law 46 provides:

> [t]he commissioner [of the DEP] may grant individual variances for asbestos projects at specific sites, from particular requirements related to asbestos prescribed by this code and regulations or orders of the commissioner promulgated thereunder, whenever it is found, upon presentation of adequate proof, that compliance with such requirements would impose unreasonable hardship. In granting a variance the commissioner may impose such conditions as the policies of this code may require and shall publish in the City

(Footnote continued)

Local Law 76 and the regulations have previously been challenged in federal court by asbestos abatement contractors on the ground that they were preempted by the regulations of the occupational Safety and Health Administration. The district court's dismissal of that action was affirmed in part and reversed in part by the Second Circuit in *Environmental Encapsulating Corp., v. City of New York*, 855 F.2d 48 (2d Cir. 1988). The Second Circuit held that a valid public health purpose, as opposed to occupational health and safety, protected a majority of the City's asbestos laws from a preemption challenge. *Id.* at 57. However, two worker safety regulations regarding medical surveillance of asbestos abatement workers and worker respiratory protection, were found to be preempted by federal law. *Id.*

DISCUSSION

The Court's role on a motion under Rule 12(b)(6) to dismiss for failure to state a claim upon which relief can be granted is a limited one: it must accept plaintiffs' well pleaded allegations at face value and construe the allegations in the complaint in plaintiffs' favor. *Dwyer v. Regan*, 777 F.2d 825, 829 (2d Cir. 1985). The court may dismiss the complaint only if "it appears beyond doubt that plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

A. *Substantive Due Process:*

Economic and social welfare legislation is consistent with the requirements of due process if it is rationally related to a legitimate governmental objective. *E.g., Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974) (zoning ordinance restricting land use to one family dwellings upheld against constitutional challenge).

Record no later than seven days after granting of such variance a statement of the reasons leading to his or her decision.

Administrative Code § 24-146.1(i). The procedure to be followed by an applicant seeking a variance is set forth in DEP Regulations § 8102.

> It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way . . . . [It is] clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations.

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15-16 (1975). A statute that does not burden a suspect class or a fundamental interest will not be overturned unless the varying treatment of different groups or persons is so unrelated to the achievement of any legitimate purpose that the Court can only conclude that the legislature's action was irrational. *E.g.*, *Pennell v. City of San Jose*, 108 S.Ct. 849, 859 (1988) (rent control ordinance authorizing hearing examiner to consider hardship to tenants in determining the extent of a rental increase for landlords did not violate due process or equal protection).[4]

Plaintiffs do not contest the legitimacy of the stated purpose of Local Law 76 "to safeguard the public health by requiring that renovation or demolition projects which disturb asbestos be conducted in accordance with procedures established pursuant to the provisions of this local law . . . ." Local Law 76 at §1. This Court also concurs with the Second Circuit's explicit recognition that Local Law 76 and the regulations "have a legitimate and substantial purpose to promote public safety and health." *Environmental Encapsulating Corp., v. City of New York*, *supra*, 855 F.2d at 55.

Instead, plaintiffs challenge the manner in which the City has sought to achieve this legitimate purpose of protecting the public health. They argue it is irrational to make building owners pay the cost for asbestos safety when the City approved the installation of such asbestos in the first instance. The crux of

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[4] Neither fundamental rights nor suspect classifications are involved in the present action.

plaintiffs' argument is estoppel: the City required fireproofing and approved the use of asbestos-containing materials as one of two available fireproofing methods; plaintiffs chose to install asbestos solely because of the City's fireproofing requirements; therefore the City is estopped from requiring plaintiffs to pay the costs of ensuring the safety of the public from asbestos when alteration, renovation, or demolition work is performed on the buildings.

It is clear however, that an owner of a lawfully constructed building can be compelled in the name of public safety to make improvements to the property, even when those improvements require great expense. *E.g.*, *Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80, 82-83 (1946). (New York law requiring installation of sprinklers can be applied to buildings constructed in conformity with preexisting laws). Construction of a building in full compliance with existing laws does not provide an owner with immunity against the subsequent legitimate exercise of police power by the state. *Id.*

> Little need be said on the due process question. We are not concerned with the wisdom of the legislation or the need for it. Protection of the safety of persons is one of the traditional uses of the police power of the States .... Many types of social legislation diminish the value of the property which is regulated. The extreme cases are those where in the interest of the public safety or welfare the owner is prohibited from using his property. We are dealing here with a less drastic measure. But in no case does the owner of property acquire immunity against the exercise of the police power because he constructed it in full compliance with the existing laws. The police power is one of the least limitable of governmental powers, and in its operation often cuts down property rights.

Id. (citations omitted).

Plaintiffs argue this is a case of first impression because the City's express approval of the installation of asbestos-containing

material is fundamentally different than the passage of laws and regulations which are later superceded by more exacting requirements. While plaintiffs' position is sympathetic, there is no reasoned distinction between this case and other cases which upheld the legislatures ability to require building owners to comply with new safety requirements which differed from preexisting ones. *See Queenside Hills Realty Co. v. Saxl*, supra, 328 U.S. at 82-83; *McCallin v. Walsh* 64 A.D. 2d 46, 407 N.Y.S.2d 852 (lst Dept.), *aff'd*, 46 N.Y.2d 808, 413 N.Y.S.2d 922 (1978) (due process challenge rejected to a City law which required the installation of costly elevator alarm and sprinkler/smoke control systems and the adoption of a fire safety plan in certain office buildings); *Oriental Boulevard Co. v. Heller*, 27 N.Y.2d 212, 221, 316 N.Y.S.2d 226, 231 (1970) *app dism'd*, 401 U.S. 986 (1971) (law requiring installation of air pollution control equipment held constitutional). In each of these cases, new laws were enacted that forced a building owner to make costly expenditures to his or her property in the interest of public health and safety, even though the building had been in compliance with the prior legal requirements.[7]

In *McCallin*, the court rejected the argument that the City could not constitutionally pass legislation which would require builders to take out previously lawful elevator equipment and replace it with other equipment designed to further protect public safety, despite the fact that this meant the costly removal of the prior lawful equipment. *McCallin v. Walsh*, *supra*, 64 A.D.2d 46, 60-64 407 N.Y.S.2d 852, 859-63. Plaintiffs suggest that advances in safety technology justified the new safety laws in *McCallin* and such advances are not present in this case. This argument is misguided. The advances in science that unveiled the safety risks presented by asbestos are indistinguishable

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[7] Similarly, the fact that plaintiffs may not have been at fault for the existence of the dangerous condition does not exempt them from the exercise of the City's constitutional power to protect the public from the condition. *See generally*, Section 107 of the Comprehensive Environmental Response Compensation and Liability Act of 1980, 42 U.S.C. § 9607 (strict liability imposed on property owners for the costs of remedial action to clean up hazardous waste on their property).

from the developments plaintiffs concede would justify new regulations imposing costly burdens on property owners. The adoption of public health and safety regulations does not constitutionally constrict the City's future ability to exercise its police powers in order to protect the public. When the public welfare is found to be in need of additional protection over and above the current regulatory scheme enacted by the City, there is no due process impediment to the City's power to rationally modify, rescind, or overrule its prior regulations.

1. *Retroactivity*

Local Law 76 and the regulations apply only when owners chose to perform alteration, renovation, or demolition work on their buildings in the future. Nevertheless, plaintiffs argue the law has a retroactive effect because all office buildings in New York of necessity require such work in order to remain economically viable as office buildings readily adaptable to new tenants. Therefore, they claim Local Law 76 forces them to retroactively undo their compliance with the fireproofing regulations.

Retroactive legislation is generally constitutional, even if it upsets settled expectations or imposes a new liability based on a past act. *Canisius College v. United States*, 799 F.2d 18, 25 (2d Cir. 1986), *cert. denied*, 481 U.S. 1014 (1987). Due process, however, "generally does not permit retrospective application of statutes that cause especially 'harsh and oppressive' consequences." *Louis Vuitton S.A. v. Spencer Handbags Corp.*, 765 F.2d 966, 972 (2d Cir. 1985). The proper test for determining the constitutionality of an economic or social law which has a retroactive effect is the same as that for a law with only a prospective effect: whether there exists a legitimate legislative purpose for the law which will be accomplished by a rational means. *Pension Benefit Guaranty Corp. v. R.A. Gray Co.*, 467 U.S. 717, 729 (1984). For retroactive laws, the retroactive application itself must be justified by a rational legislative purpose. *Id.* at 730.

Plaintiffs argue the Court should apply the structured, four-part substantive due-process test enunciated in *Nachman Corp.*

v. Pension Benefit Guaranty Corp., 592 F.2d 947 (7th Cir. 1979), *aff'd on other grounds*, 446 U.S. 359 (1980), and endorsed in this District by *Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 549 F.Supp. 404, 406 (S.D.N.Y. 1982), *aff'd*, 725 F.2d 843.[8] The four factors set forth in *Nachman* to decide if legislation represents a rational means to a legitimate end are: (1) the reliance interests of the parties affected; (2) whether the impairment of the private interest is effected in an area previously subjected to regulatory control; (3) the equities of imposing the legislative burdens; and (4) the inclusion of statutory provisions designed to limit and moderate the impact of the burdens. *Nachman Corp. v. Pension Benefit Guaranty Cord.*, *supra*, 592 F.2d at 960.

Assuming for the purposes of this motion that Local Law 76 has a retroactive effect and that the criteria enunciated in *Nachman* are relevant, Local Law 76 still clearly meets the requirements of due process. Plaintiffs' only applicable contention relates to the first prong of the *Nachman* test: reliance on the City's approval of asbestos-containing material as a fireproofing method. Reliance on prior law alone is clearly not enough to state a due process claim. *See Queenside Hills Realty Co. v. Saxl*, *supra*, 328 U.S. at 82-83. Further, it was evident that the area of building alterations was one subject to intensive regulation, including regulations protecting the public welfare. Plaintiffs could not reasonably have expected to acquire immunity from the future exercise of the City's police powers by compliance with the existing safety provisions. To the contrary, building owners could very well expect to be subject to future public health regulations when conditions were uncovered in their

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[8] Plaintiffs do not point out that the Second Circuit in *Textile Workers* expressly declined to decide if such a test was appropriate to apply to retroactive legislation. *Textile Workers Pension Fund v. Standard Dye and Finishing Co., Inc.*, 725 F.2d 843, 850 (2d Cir.), *cert. denied*, 467 U.S. 1259 (1984). Furthermore, the Supreme Court, in *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, *supra*, 467 U.S. at 727 n.6, rejected the application of the *Nachman* test in the context for which it was devised, federal legislation affecting economic benefits and burdens. The Supreme Court, however, did leave open the possibility that these four factors might be relevant in some circumstances. *Id.*

buildings which posed a threat to public health or safety, regardless of the source of the condition. The third and fourth factors of *Nachman* also favor upholding the asbestos law. Importantly, plaintiffs receive the economic benefits from the alteration, renovation, or demolition work they wish to do on their buildings and the law only applies when plaintiffs voluntarily seek to undertake such work. While plaintiffs may be required to bear the cost to protect the public from airborne asbestos in their buildings, they are granted the reciprocal privilege of profiting from the public through the use of these buildings. In addition, the Supreme Court has explained that:

> [u]nder our system of government, one of the State's primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others.... These restrictions are "properly treated as part of the burden of common citizenship." *Kimball Laundry Co v. United States*, 338 U.S. 1, 5 (1949). Long ago it was recognized that "all property in this country is held under an implied obligation that the owner's use of it shall not be injurious to the community, ..."

Keystone Bituminous Coal. Ass'n v. De Benedictis, 480 U.S. 470, 491-92 (1987)(citations omitted).

Finally, the variance provision allows for mitigating circumstances to be considered when compliance with the law is argued to be infeasible in the individual case. Accordingly, Local Law 76 satisfies the requirements of due process even under the *Nachman* test plaintiffs urge the Court to apply.

Moreover, restricting the ability of a property owner to use his or her property in the specific manner which is most likely to expose the public to the dangers associated with airborne asbestos is clearly a limited, rational approach to effectuate the valid purpose of protecting the public health; plaintiffs have not stated a substantive due process claim.

B. *Procedural Due Process*

Plaintiffs argue that the private asbestos investigators are improperly given unbridled reign to determine the application of Local Law 76. The gravamen of this argument is that the absence of a formal procedure for an appeal from an asbestos investigator's refusal to certify the absence of asbestos is a denial of property without due process of law.

There is clearly no merit to plaintiffs' procedural due process claim. The determination that friable asbestos be removed or encapsulated has been made by the legislature. The determination as to how asbestos abatement work is to be performed is made by the DEP pursuant to Local Law 76. The decision not to approve permits for building alteration or demolition work is made by the DOB. The protection offered by the legislative process satisfies the requirements of procedural due process when the legislature enacts a law, or an agency promulgates a rule, affecting a general class. *See e.g., J. Nowak, R. Rotunda, J. Young, Constitutional Law*, 2d. ed., 1983 at 556.

Asbestos investigators fulfill a role analogous to the qualified professionals, usually registered architects or professional engineers, who are required to prepare or supervise the preparation of all building plans authorized by the owner. *See* Administrative Code §§27-140, 27-142, and 27-151. The DOB is empowered to examine and approve such plans. City Charter §645(b)(1). Any owner who retains a licensed or certified professional and is not satisfied with the licensee's work, has three remedies: (1) he or she can simply obtain the services of another professional; or, in the case of incompetent or dishonest work, (2) he or she can report the professional to the licensing or certifying body; or (3) he or she can take the matter to court by suing the professional for negligence or malpractice.[9] Even

[9] Plaintiffs' allegation that asbestos investigators may be unwilling to certify that asbestos is not present in a building because of the fear of civil liability from an incorrect certification is purely speculative and insufficient to support a procedural due process claim.

if the asbestos investigators are construed as performing a governmental function, plaintiffs have recourse to a forum affording them full due process rights regarding the investigators' determination, including the right to a hearing and an impartial decision maker. An adequate state court remedy satisfies the requirements of due process. *Campo v. New York City Employees' Retirement System*, 843 F.2d 96, 102-03 (2d Cir.), *cert. denied*, 109 S.Ct. 220 (1988). More importantly, it is the legislature, the DEP and ultimately the DOB who act as the relevant decision makers in the process. Plaintiffs do not challenge any of these decisions as a constitutional violation of procedural due process.[10]

Furthermore, the variance provision provides plaintiffs an opportunity to be individually heard by the DEP regarding the specific asbestos project in question. Plaintiffs, apparently unaware of the amendment adding the variance provision, argue that the absence of a variance makes the Local Law fatally deficient, and distinguishes it from the similar law upheld in *McCallin*. Obviously, the existence of such a variance moots this aspect of plaintiffs' argument.

C. *Taking of Property Without Just Compensation*

The Fifth Amendment, made applicable to the States through the Fourteenth Amendment, provides, in relevant part, that "private property [shall not] be taken for public use, without just compensation." This guarantee "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). However, the Supreme Court has often "upheld substantial regulation of an owner's use of his own property [against taking claims] where deemed necessary to promote the public

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[10] Defendants argue that plaintiffs have no standing to assert a procedural due process argument based on a hypothetical failure of an asbestos investigator to certify that work will not disturb asbestos because they have admitted that their buildings contain asbestos and are subject to Local Law 76. Regardless of their standing to maintain such a claim, the Court concludes that the claim itself is insufficient to provide plaintiffs with relief.

interest." *E.g. Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). In fact, regulation restricting the use of property is a primary means available to a State to protect the public welfare. *Keystone Bituminous Coal Ass'n v. De Benedictis, supra*, 480 U.S. at 489-91 (1987) (prohibition on the mining of coal from certain areas to prevent subsidence damage did not constitute a taking of mine owners' property).

No set formula exists to determine whether compensation is constitutionally due for a governmental restriction on property. *Loretto v. Telepromoter Manhattan CATV Corp., supra*, 458 U.S. at 426. The analysis of whether a taking has occurred is generally "*ad hoc*, [and] factual." *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978). Several factors should be considered in a takings analysis, including the character of the governmental action and the economic impact of the regulation on the claimant, especially the extent to which the regulation has interfered with distinct investment-backed expectations. *Id.*

On the one hand, when the character of the restriction reaches the "extreme form of a permanent physical occupation, a taking has occurred." *Loretto v. Telepromoter Manhattan CATV Corp., supra*, 458 U.S. at 426 (New York statute providing that a landlord must permit a cable television company to install its cable facilities upon his or her property found to be a taking). On the other hand, a statute regulating the uses that can be made of property results in a taking if it "does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land." *Agins v. Tiburon*, 447 U.S. 255, 260 (1980); *Keystone Bituminous Coal Ass'n v. De Benedictis, supra*, 480 U.S. at 485; *United States v. Riverside Bayview Homes Inc.*, 474 U.S. 121, 125 (1985).

Plaintiffs argue Local Law 76 constitutes governmental action akin to a physical taking because plaintiffs are required to remove materials originally installed at the City's direction through a process of sealing off and closing portions of their buildings. Defendants respond that plaintiffs assert at most a regulatory takings claim and, because they do not allege the

extinguishment of all economically viable use of their property, the takings claim is not viable.

The character of Local Law 76 is clearly that of a regulation on the use of property. The law only applies when the owner of property seeks to use it in a manner which threatens to make asbestos become airborne. The fact that a use regulation may have some impact on the physical characteristics of the land is unexceptional. *See Keystone Bituminous Coal Ass'n v. De Benedictis, supra*, 480 U.S. at 488-89, n.18. Plaintiffs argue that an expansive definition of what constitutes a physical appropriation of property is called for because of the City's prior fireproofing requirements. Plaintiffs, however, have presented no legal support for such a claim. In fact, applying a broad brush in construing whether a regulation works a physical appropriation of property flies in the face of the Supreme Court's express warnings against overly constricting State's ability to regulate the use of property to protect the public welfare. *Loretto v. Teleprompter Manhattan CATV Corp., supra*, 458 U.S. at 441.

In holding that a taking had occurred in *Loretto*, the Supreme Court specifically underscored the narrowness of its ruling, basing its determination on the fact that the statute in question resulted in an actual physical appropriation of part of the landlords' property. *Loretto v. Teleprompter Manhattan CATV Corp., supra*, 458 U.S. at 441. The Supreme Court in *FCC v. Florida Power Corp.*, 480 U.S. 245, 251 (1987), reemphasized the narrow scope of *Loretto*, finding it inapplicable to regulations which decreased the rent cable television companies had to pay utility companies for the use of utility poles because the utility companies had previously agreed to allow access to the poles.[11] Even if Local Law 76 is analyzed under the framework set forth in *Loretto* and *Florida Power* for the physical appropriation of property, the law does not constitute a taking of plaintiffs' property because it requires asbestos be removed

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[11] The Supreme Court expressly declined to reach the question of whether *Loretto* would apply were the utility companies required to offer access to the cable television providers. *FCC v. Florida Power Cor., supra*, 480 U.S. at 251-52, n.6.

only if the building owner voluntarily chooses to undertake alteration work which will cause asbestos to become airborne.

Furthermore, the Court in *Loretto* took steps to explain that the invalid law removed the rights of ownership from the landlords by directing that a third party be allowed to install the cable television equipment. If the landlords were simply required to install the equipment themselves a different question might have been presented, because they would have continued to enjoy the rights of ownership, including the ability to control compliance with the statute. *Loretto v. Teleprompter Manhattan CATV Corp., supra*, 458 U.S. at 440-41, n.19.[a] Local Law 76 and the regulations clearly allow plaintiffs to maintain all their rights of control over the manner in which compliance with the law is achieved.

Despite plaintiffs diligent attempts to characterize Local Law 76 as a physical invasion of their property, the law simply regulates the uses that they can make of the buildings, and does so in a rather narrow manner. The ability to renovate the buildings is conditioned on the protection of the public from the dangers associated with airborne asbestos. Plaintiffs are free to use the buildings without making alterations or to make alterations that do not present a public health hazard by causing asbestos to become airborne. If plaintiffs choose either of these alternatives, the strictures of Local Law 76 can be completely avoided. The extent of any alteration work to be performed, and therefore the extent of the cost of compliance with the law

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[a] In *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) the Supreme Court found a taking had occurred from the imposition of a navigational servitude by the government on plaintiff's private marina, subjecting it to access by the public. The navigational servitude imposed by the government in *Kaiser Aetna* stripped plaintiffs of their ability to exclude the public from their property, a fundamental element of their rights as owners, and as such was an actual physical invasion which constituted an appropriation of plaintiffs' property. *Id.* Local Law 76 and the regulations do not present an analogous factual situation as an owner's dominion and control over his or her property, including the right to exclude others, remains unaffected by the City's requirements.

for any asbestos project, is solely left to the discretion of plaintiffs. Furthermore, plaintiffs continue to control the activities that occur in their buildings and remain able to supervise or dismiss the qualified individuals they voluntarily choose to retain to perform the asbestos removal work. It is plaintiffs who remain ultimately responsible for compliance with the requirements of Local Law 76. Their ownership rights in the property are not significantly diminished by the requirements of asbestos removal.

Plaintiffs next contend that Local Law 76 and the regulations constitute a taking because they eliminate the intended use of the property as office buildings readily adaptable to tenants with diverse office space needs. Plaintiffs creative definition of the intended use of their property, while resulting in a conflict with the requirements of Local Law 76, does not state a takings claim. Legislation enacted pursuant to the police power will not be a taking because it denies an owner the most profitable, or preferred, use of the property. *Keystone Bituminous Coal Ass'n v. De Benedictis*, *supra*, 480 U.S. at 489 n.18; *Penn Central Transportation Co. v. City of New York*, *supra*, 438 U.S. at 124, 133; *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 592 (1962) (ordinance prohibiting certain excavation did not constitute taking even though it prohibited prior use of land by plaintiff); *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926).

Moreover, regulations which have caused substantial reductions in property value have not been found to constitute a taking. *Sadowsky v. City of New York*, 732 F.2d 312, 317-18 (1984); *Pompa Construction Corp. v. City of Saratoga Springs*, 706 F.2d 418, 425 (2d Cir. 1983). *See also Hadacheck v. Sebastian*, 239 U.S. 394, 410 (1915) (ordinance prohibiting use of property as brick yard not a taking even when the result is a decrease in property value from $800,000 to $60,000). When the health, safety, or general welfare of the public would be protected by prohibiting a particular contemplated use of land, the Supreme Court has consistently upheld land use regulation that destroyed or adversely affected recognized real property interests. *Penn Central Transportation Co. v. City of New York*, *supra*, 438 U.S. at 125.

Contrary to plaintiffs' suggestion, compliance with the City's prior fireproofing requirements does not remove this case from the established case law regarding the government's ability to restrict the use of property for the public benefit. As the Supreme Court has noted:

> "taking" challenges have . . . been held to be without merit in a wide variety of situations when the challenged governmental actions prohibited a beneficial use to which individual parcels had previously been devoted and thus caused substantial individualized harm."

Penn Central Transportation Co. v. City of New York, *supra*, 438 U.S. at 125. Indeed, valid zoning laws which prohibit an entire use of property result in more severe hardship on property owners than Local Law 76, which only adds to the cost of a specific use of property dangerous to the public, and leaves the final choice on how to use the property in the hands of the owner.

Plaintiffs have failed to allege a sufficient diminution in value or use of their buildings caused by Local Law 76 to state a claim. While they contend that compliance with the law will result in substantial cost, they make no allegation that the buildings will be robbed of all economic use. Complaint at ¶¶ 34-38. Plaintiffs have not alleged that the law will force them to give up the general use of their property as office buildings, nor have they even alleged that the operation of their buildings will be unprofitable. *See Keystone Bituminous Coal Ass'n v. De Benedictis*, *supra*, 480 U.S. at 495-96. ("petitioners have not claimed . . . the Act makes it commercially impracticable for them to continue mining. . . . Indeed, petitioners have not even pointed to a single mine that can no longer be mined for profit").

Plaintiffs are not required to seal off the entire building while asbestos is removed under the regulations, only those sections which will be affected by the alteration work. Those parts of the building not being renovated are fully available for plaintiffs' use and economic benefit. Apparently, the buildings continue

to be used by plaintiffs as office buildings, a reflection of plaintiff's own determination that the benefits of continued operation outweigh the costs of compliance with Local Law 76.

Local Law 76 and the regulations impose additional costs on plaintiffs as incident to their ownership of property, but these costs are well within the scope of the City's police powers. Accordingly, plaintiffs have failed to state a constitutional takings claim.[13]

D. *State Law Claims*

The second through eighth claims for relief in the Complaint assert a series of pendent state causes of action which attack the validity of Local Law 76 and the DEP regulations. Briefly, these claims allege that:

> (a) Local Law 76 delegates legislative and governmental authority to the DEP in violation of the state constitution;
>
> (b) Local Law 76 delegates sovereign authority to a private person in violation of the state constitution;
>
> (c) the DEP regulations are inconsistent with Local Law 76;
>
> (d) the DEP regulations are inconsistent with the Air Pollution Control Code, of which Local Law 76 is a part;
>
> (e) Local Law 76 and the regulations violate the Environmental Conservation Law;

---

[13] Plaintiffs argue that the motion to dismiss should be denied in order to afford them the opportunity to conduct discovery concerning when the City knew of the dangers of airborne asbestos and why a prior City draft of Local Law 76, with more onerous requirements on property owners, was not adopted by the City. Neither of these subject areas will yield information relevant to the determination of the constitutional claims and therefore the discovery request is insufficient to defeat the motion to dismiss.

(f) Defendants are estopped from enforcing Local Law 76;

(g) Defendants have been unjustly enriched.

Dismissal of the federal claims upon which plaintiffs base jurisdiction in federal court at this preliminary stage in the case calls for the discretionary dismissal of the pendent state claims as well. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). No prejudice will accrue to plaintiffs by such a dismissal as New York Civil Practice Law and Rules §205(a) allows plaintiffs to recommence any action in state court within six months after it is dismissed by a federal court on jurisdictional grounds, if it was timely commenced in the first instance. *See Dunton v. County of Suffolk*, 729 F.2d 903, 911 n.8 (2d Cir.), *amended on other grounds*, 748 F.2d 69 (1984). Therefore, the pendent state claims should be dismissed pursuant to Rule 12(b)(1), Fed. R. Civ. P. for lack of subject matter jurisdiction.

CONCLUSION

Local Law 76 and the regulations do not violate substantive due process, procedural due process, nor do they constitute a taking without just compensation under the Fifth and Fourteenth Amendments to the Constitution. Accordingly, defendants' motion to dismiss the federal constitutional claims is granted. The pendent state law claims are also dismissed for lack of subject matter jurisdiction.

It is so ordered.

Dated: New York, New York
May 24, 1989

/s/Robert Ward
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------- X

MELVYN KAUFMAN, 77 WATER STREET, INC., 77 WATER STREET ASSOCIATES, 127 JOHN STREET FEE ASSOCIATES, 127 JOHN STREET ASSOCIATES, 437 MADISON AVENUE FEE ASSOCIATES, and 437 MADISON AVENUE ASSOCIATES,

Plaintiffs,

- against -

THE CITY OF NEW YORK, THE ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK, EDWARD I. KOCH, in his capacity as mayor of the City of New York, HARVEY W. SCHULTZ, in his capacity as Commissioner of the Department of Environmental Protection, and CHARLES M. SMITH, JR., in his capacity as Commissioner of the Department of Buildings,

Defendants.

: Civil Action No.

: COMPLAINT

---------- X

Plaintiffs Melvyn Kaufman, 77 Water Street, Inc., 77 Water Street Associates, 127 John Street Fee Associates, 127 John Street Associates, 437 Madison Avenue Fee Associates, and 437 Madison Avenue Associates, by their attorneys, Shea and Gould, for their complaint herein allege:

PARTIES

1. Plaintiff Melvyn Kaufman is a co-owner of the fee interest in the land having the street address 77 Water Street, New York, New York; he lives and works in New York County.

2. Plaintiff 77 Water Street, Inc. is a corporation incorporated in the State of Minnesota and is the other co-owner of the fee interest in the land having the street address 77 Water Street, New York, New York.

3. Plaintiff 77 Water Street Associates is a partnership organized pursuant to the laws of the State of New York and holds the leasehold interest in the land having the street address 77 Water Street, New York, New York.

4. Plaintiff 127 John Street Fee Associates is a partnership organized pursuant to the laws of the State of New York and holds the fee interest in the land having the street address 127 John Street, New York, New York.

5. Plaintiff 127 John Street Associates is a partnership organized pursuant to the laws of the State of New York and holds the leasehold interest in the land having the street address 127 John Street, New York, New York.

6. Plaintiff 437 Madison Avenue Fee Associates is a partnership organized pursuant to the laws of the State of New York and holds the fee interest in the land having the street address 437 Madison Avenue, New York, New York.

7. Plaintiff 437 Madison Avenue Associates is a partnership organized pursuant to the laws of the State of New York and holds the leasehold interest in the land having the street address 437 Madison Avenue, New York, New York.

8. Defendant The City of New York (the "City") is a municipal corporation chartered under the laws of the State of New York.

9. Defendant Environmental Control Board is a board formed pursuant to statutory authority under the New York City Charter.

10. Defendant Edward I. Koch is the Mayor of the City of New York.

11. Defendant Harvey W. Schultz is the Commissioner of the Department of Environmental Protection.

12. Defendant Charles M. Smith, Jr. is the Commissioner of the Department of Buildings.

JURISDICTION AND VENUE

13. This action arises under the Fifth and Fourteenth Amendments of the Constitution of the United States, 42 U.S.C. 1983, Sections 6, 7 and 11 of Article I of the Constitution of the State of New York, the New York State and New York City laws alleged herein and the common law. This is an action to declare unconstitutional and void New York City Local Law No. 76 of 1985 (Int. 891-B), as amended by New York City Local Law No. 80 of 1986, and the regulations promulgated pursuant thereto.

14. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and the principles of pendent jurisdiction.

15. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b).

FACTUAL BACKGROUND

16. On or about 1968, plaintiff 437 Madison Avenue Associates erected a building having the street address 437 Madison Avenue, New York, New York. On or about 1970, plaintiff 77 Water Street Associates erected a building having the street address 77 Water Street, New York, New York. On or about 1971-72, plaintiff 127 John Street Associates erected a building having the street address 127 John Street, New York, New York (these buildings are hereinafter collectively referred to as "the Properties").

17. When the Properties were being erected, plaintiffs were required, pursuant to New York City Administrative Code provisions in effect, to use certain approved fireproofing material in the construction of the aforesaid buildings.

18. Pursuant to New York city Administrative Code provisions in effect at the time the Properties were being built, only materials approved by the Board of Standards and Appeals ("BSA") could be used for fireproofing, and, at the time, the BSA had approved only two types of materials which could be used effectively in fireproofing steel deck structural steel buildings, such as the Properties: asbestos containing material ("ACM") or cementitious material. The accepted method for constructing large office buildings was at the time, and still is, the steel deck method.

19. As a result of the requirements constituted by and contained in the aforesaid provisions and approval, plaintiffs used ACM as the fireproofing material in the Properties.

20. Despite (a) previously requiring plaintiffs to install fireproofing in the Properties, (b) specifically limiting the choice of fireproofing material which plaintiffs could use in erecting the Properties, and (c) effectively requiring the use of asbestos or one other material for said fireproofing, in 1985 the City passed legislation which, together with regulations promulgated pursuant thereto, in effect requires plaintiffs, and all other owners of buildings in New York City who had used ACM in constructing their buildings because of the prior City regulations and BSA approval, to remove or encapsulate the ACM and to be responsible for the full costs of removal or encapsulation of this ACM, which costs are greatly inflated by the procedures required by said legislation and regulations.

21. In particular, on November 19, 1985, the Council of the City of New York enacted New York City Local Law No. 76 of 1985 (Int. 891-B) ("the Local Law"), which legislation was signed by defendant Koch on December 2, 1985.

22. On December 9, 1986 the Local Law was amended by the Council of the City of New York by legislation known as New York City Local Law No. 80 of 1986, which legislation was signed by defendant Koch on December 22, 1986.

23. Defendant Schultz is empowered by the Local Law to enact regulations pursuant to the Local Law and enforce certain of its provisions.

24. Defendant Smith is empowered by the Local Law to deny building permits and approval of plans to those applicants for permits and those applicants for approval of plans who do not comply with the Local Law or with regulations promulgated by defendant Schultz under the Local Law.

25. Defendant Environmental Control Board is empowered by the Local Law to impose civil penalties for violations of any of the Local Law's provisions or of any regulations promulgated pursuant thereto.

26. On March 27, 1987 defendant Schultz promulgated regulations purportedly pursuant to the Local Law as amended, known collectively as The Asbestos Control Program Rules and Regulations, Section 8000 et seq. ("the Regulations"). The Regulations became effective on April 1, 1987 and were amended in 1988.

27. The Local Law imposes, *inter alia*, the following obligations upon plaintiffs who, since they were required to follow City requirements and pursuant to BSA approval, used ACM in the construction of their Properties:

> a. Plaintiffs, and other applicants who seek building permits or approval of building plans, cannot obtain such permits or approval of plans unless an "asbestos investigator" certifies that the alteration, renovation, modification or demolition work which is to be performed on the building will not disturb a certain amount of friable ACM. The ownership of large office buildings necessarily involves continual turnover

of tenants and continual major alteration, renovation, modification and demolition work in connection therewith, which by the nature of the work disturbs more than the allowable friable ACM at buildings where, because of the City requirements and BSA approval, ACM was used, so that this certification cannot be obtained where ACM was used.

b. If plaintiffs, or other applicants, are unable to obtain such certification, which is the case where there is major alteration, renovation, modification or demolition and where ACM was used because of City requirements and BSA approval, said person must submit to defendant Smith a fee not to exceed $800 and a plan approved by defendant Schultz for preventing the ACM from becoming airborne which details compliance with the Local Law and any rules or regulations promulgated thereunder. This plan, in order to be even considered for approval by defendant Schultz, must also be accompanied by a fee not to exceed $1,000.

c. Plaintiffs, or other applicants, are subject to stop-work orders if defendant Schultz determines that the work being performed on the Properties violates the Local Law or any rules and regulations promulgated thereunder.

d. Plaintiffs, or other applicants, are subject to any regulations promulgated pursuant to the Local Law and face fines imposed by defendant Environmental Control Board of up to $10,000 for each violation of the obligations imposed by the Local Law or any regulations promulgated pursuant thereto.

28. The Regulations impose, *inter alia*, the following obligations upon plaintiffs and other building owners who, since they were required to follow city requirements and pursuant to BSA approval of ACM, used said material in the construction of their properties:

a. Plaintiffs, as building owners, and other building owners similarly situated, are singled out as being responsible for the proper performance of the extensive and burdensome asbestos abatement activities required by the Regulations, including (i) removal, enclosure or encapsulation of ACM, (ii) preparation of the workplace for said activities, (iii) sampling, analysis and monitoring activities to detect the presence of any disturbed ACM and (iv) air clearance monitoring which must be performed at the conclusion of any work performed on the buildings where ACM is disturbed, all of which requirements are extremely expensive.

b. Plaintiffs, as building owners, and other building owners similarly situated, are singled out as being responsible for determining the absence or presence of ACM which will be disturbed during the course of alteration, renovation, modification or demolition activities in connection with work on the buildings and for following the notification procedures set forth in the Regulations, which include that plaintiffs must submit a filing fee of $500-$800 in every instance that work in connection with alteration, renovation or modification of the buildings will disturb a certain amount of ACM.

c. Plaintiffs, as building owners, and other building owners similarly situated, are singled out to be the employers of those persons required to conduct air sampling and/or analysis in connection with work which will disturb a certain amount of ACM and are thus liable for said persons' negligence in the performance of said sampling or analysis, the cost of their employment, and for any violations by said persons of the Local Law or Regulations, amounting to absolute liability of plaintiffs by virtue of their status as building owners.

d. Plaintiffs, as building owners, and other building owners similarly situated, are required to evacuate that portion of their buildings where asbestos abatement activities are occurring until the air in that portion of the building is free, according to the standards set forth in the Regulations, of any ACM, which period may take as long as three months, at great loss of income to plaintiffs.

29. The Local Law provides that where any person fails to comply with the obligations set out in paragraphs 27 and 28 hereof, they shall be liable for civil penalties of up to $10,000 for each violation of the Local Law and/or Regulations cited by defendant Schultz, excepting violations of § 1403.2-9.12(b)(1) of the Local Law (for handling asbestos without a license) for which a lesser penalty is provided.

30. The Regulations specifically make plaintiffs as building owners, and other building owners similarly situated, liable for the aforesaid penalties regardless of whether it is they or another applicant for a building permit or approval of plans, such as a building tenant, who violates any of the obligations set forth in paragraphs 27 and 28 hereof.

31. The ownership of large office buildings necessarily involves continual turnover of tenants and continual major alteration, renovation, modification and demolition work in connection therewith, which by the nature of the work disturbs the ACM beyond the allowable limits set in the Local Law and Regulations. Thus, even though the Local Law, and to a lesser extent the Regulations, may at first glance appear only to be an attempt to maintain certain safety standards when ACM is being disturbed, in reality the Local Law and Regulations, by virtue of the continuing alterations, renovation, modification and demolition required in large office buildings, in effect, requires the owners of such buildings to spend large sums of money to remove or encapsulate the ACM, which the owners used in the buildings in the first place because it was effectively one of two fireproofing materials required by the City.

32. Further, without removing or encapsulating the ACM, the owners cannot obtain a permit to alter or renovate, and thus cannot rent to a new tenant once the present tenant vacates. Therefore, the owner has no choice but to spend the large sums of money to remove or encapsulate the asbestos, since otherwise his floors must remain vacant and he will lose large sums of money, all because he was required to use ACM as effectively one of two fireproofing materials required by the City.

33. Thus, what may seem like an effort to maintain safety conditions where a building owner chooses to disturb ACM is in fact a transparent attempt by defendants to require plaintiffs and other building owners to bear the huge expense of removing or encapsulating ACM which was used in the buildings because it was effectively one of two fireproofing materials required to be used by the City.

34. Plaintiffs have been forced to expend vast sums of money in order to comply with the Local Law and the Regulations and in order to undo a problem created not by them but by the City through its fireproofing requirements and its approval of ACM as a fireproofing material, and plaintiffs have suffered a severe loss in the value of the Properties.

35. In particular, plaintiff 77 Water Street Associates has, in order to comply with the Local Law and the Regulations, been forced to expend approximately $5,592,083 to remove ACM on certain floors of 77 Water Street and additionally has lost $1,240,925 in rent for the period during which it was required by the Local Law and Regulations to evacuate those floors. Moreover, asbestos abatement activities must still be performed on other floors of 77 Water Street at an approximate cost of $2,954,318, together with an approximate rent loss of $581,473, while these floors are evacuated.

36. Plaintiff 437 Madison Avenue has been forced to expend approximately $2,179,746 to remove ACM on certain floors of 437 Madison Avenue in compliance with the Local Law and Regulations and has lost approximately $197,886 in rent for the period during which it was required by the Local Law and

Regulations to evacuate those floors. Moreover asbestos abatement activities must still be performed on other floors at 437 Madison Avenue at an approximate cost of $18,864,238, together with an approximate rent loss of $5,879,092.

37. Plaintiff 127 John Street Associates has been forced to expend approximately $722,707 to remove ACM on certain floors at 127 John Street in order to comply with the Local Law and with the Regulations, and additionally has lost approximately $130,222 in rent for the period during which it was required to evacuate those floors pursuant to the Local Law and the Regulations. Moreover, asbestos abatement activities must still be performed on other floors of 127 John Street at an approximate cost of $10,536,140 and with an approximate rent loss of $1,984,795, while those floors are evacuated.

38. Plaintiffs have also, as a direct result of the enactment of the Local Law and the Regulations, not been able to obtain the mortgages on the Properties that they were able to obtain prior to the enactment of the Local Law and the Regulations. That is, mortgagees, fearful of being deemed owners and of being held responsible for removing the ACM, either refuse outright to enter into mortgage agreements or require large reserves before they will enter into mortgage agreements. Thus, even when plaintiffs, and other building owners, are able to obtain mortgages, they must pay interest on reserves they must borrow but cannot use. Furthermore, even in buildings which do not contain ACM, mortgagees refuse to enter into mortgage agreements, or alternatively require the aforesaid reserves, because of a fear that ACM might be found in the building.

39. Plaintiffs have no adequate remedy at law.

FIRST CLAIM FOR RELIEF

40. Plaintiffs repeat and reallege paragraphs 1 through 39 with the same force and effect as if fully set forth herein.

41. The Local Law and the Regulations deprive plaintiffs of equal protection of the law and of property without due

process of law, and take plaintiffs' property for a public use without just compensation, in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States, 42 U.S.C. § 1983, and §§ 6, 7 and 11 of Article I of the Constitution of the State of New York, in the following respects:

a. They unfairly single out plaintiffs to affirmatively bear the costs and obligations of a problem created and imposed upon them by defendants;

b. They deprive plaintiffs of the use and control of the Properties;

c. They compel plaintiffs to either allow portions of their buildings to be entirely shut down for long periods amounting to a physical taking and to consent to the occupation of said portions of their building by persons performing asbestos abatement activities or to keep their buildings unoccupied when current tenants move out;

d. They substantially impair and diminish the value of plaintiffs' properties without compensation;

e. They require plaintiffs either to totally refrain from altering, renovating or modifying their Properties and thus leave the buildings vacant, or to undertake the costly and burdensome task of removing ACM in their buildings in order to comply with the Local Law and Regulations; and

f. They impose substantial penalties on plaintiffs for their mere status as building owners since plaintiffs must either expend huge amounts of money to remove or encapsulate the ACM, which is there because of prior City requirements, or leave whole floors or whole buildings vacant, and further since plaintiffs are liable for substantial violations of the Local Law and Regulations regardless of whether it is they or anyone else who violates the Local Law or

Regulations in removing or failing to remove ACM in connection with work done on the Properties and regardless of whether plaintiffs are even aware that said other persons have removed or should remove ACM.

SECOND CLAIM FOR RELIEF

42. Plaintiffs repeat and reallege paragraphs 1 through 39 with the same force and effect as if fully set forth herein.

43. In enacting the Local Law, the City has unconstitutionally delegated its lawmaking and sovereign power to defendant Schultz in the following ways:

a. The Local Law unconstitutionally grants defendant Schultz the power to determine who will be subject to the civil penalties imposed for failure to comply with the Local Law and any regulations promulgated pursuant thereto by defendant Schultz. In particular, the Local Law unconstitutionally grants defendant Schultz the power to determine who will be subject to said penalties (a) for failure to properly perform the asbestos abatement activities required by the Local Law and the Regulations, (b) for failure to properly determine whether ACM will be disturbed in connection with any alteration, renovation or modification work on the Properties, (c) for failure to properly undertake the notification requirements set forth in the Local Law and Regulations and (d) for failure to properly undertake the sampling, analysis and/or monitoring requirements of the Local Law and Regulations; and

b. The Local Law unconstitutionally grants defendant Schultz the power to determine who should bear the cost of sampling, monitoring, and/or analysis and to determine who must bear the cost of the filing fees required in connection with the notification requirements of the Local Law and Regulations in connection with work which will disturb ACM.

THIRD CLAIM FOR RELIEF

44. Plaintiffs repeat and reallege Paragraphs 1 through 39 with the same force and effect as if fully set forth herein.

45. The Local Law unconstitutionally delegates sovereign authority to a private person (a) by allowing an "asbestos investigator" to determine whether an applicant for a building permit or approval of plans is required to undertake the asbestos abatement activities required by the Local Law and Regulations, (b) by making failure to comply with the asbestos investigator's determination subject to fines of up to $10,000 per cited violation, and (c) by not allowing an appeal from the asbestos investigator's determination.

FOURTH CLAIM FOR RELIEF

46. Plaintiffs repeat and reallege paragraphs 1 through 39 with the same force and effect as if fully set forth herein.

47. Defendant Schultz has singled out and imposed all of the obligations and liabilities set forth in and resulting from the Local Law and the Regulations on plaintiffs as building owners and on other similarly situated owners of buildings regardless of whether it is they or anyone else who undertakes or should undertake removal of ACM in connection with work undertaken at plaintiffs' or other owners' buildings and regardless of whether the building owner is even aware that anyone else has or should have removed ACM in connection with work undertaken at his building.

48. The Regulations are thus a nullity since they are out of harmony with the Local Law, which does not impose all these obligations and liabilities on the building owners.

FIFTH CLAIM FOR RELIEF

49. Plaintiffs repeat and reallege paragraphs 1 through 39 and 47 with the same force and effect as if fully set forth herein.

50. Because the Regulations specifically impose all the obligations and liabilities of the Local Law and Regulations on plaintiffs as building owners, and on other building owners similarly situated, the Regulations are inconsistent with the Local Law. The Regulations are thus invalid under Air Pollution Control Code at § 24-116 which provides that where regulations are inconsistent with the Air Pollution Control Code, of which the Local Law is a part, the code is controlling.

SIXTH CLAIM FOR RELIEF

51. Plaintiffs repeat and reallege paragraphs 1 through 39 with the same force and effect as if fully set forth herein.

52. The Local Law and the Regulations have a significant effect on the environment, as said term is defined in Section 8-0105(6) of the Environmental Conservation Law ("ECL"), 6 N.Y.C.R.R. § 617.2(k) and Executive Order No. 91 (August 1977), "City Environmental Quality Review" ("CEQR"), § 1(f).

53. The Local Law and the Regulations violate Article 8 of the ECL, also known as the State Environmental Quality Review Act ("SEQRA"), 6 N.Y.C.R.R. § 617 and CEQR.

54. In particular, upon information and belief, the City, in enacting the Local Law, and defendant Schultz in promulgating the Regulations, failed to consider the potential environmental impact thereof and the damage thereto resulting from the enforcement of the Local Law and/or the Regulations.

55. Upon information and belief, the City, in enacting the Local Law, and defendant Schultz, in promulgating the Regulations, among other things, failed to:

a. Consider or analyze the effect on the environment of the Local Law and the Regulations or the environmental significance thereof;

b. Consider the necessity for preparation and circulation of an environmental impact statement;

c. Prepare either a draft or final environmental impact statement;

d. Circulate appropriate SEQRA or CEQR notices and impact statements with respect to environmental impact of the Local Law or Regulations;

e. Conduct public hearings on the environmental impact of the Local Law or Regulations or with respect to a draft environmental impact statement;

f. Make any recommendations or come to any conclusions as to the minimization of adverse impact of the Local Law or Regulations upon the environment;

g. Consult with appropriate public agencies concerning the environmental impact of the Local Law or Regulations; or

h. Otherwise take action consistent with the ECL, 6 N.Y.C.R.R. § 617, or CEQR.

56. The Local Law and the Regulations are thus null and void under the ECL, 6 N.Y.C.R.R. § 617 and CEQR.

SEVENTH CLAIM FOR RELIEF

57. Plaintiffs repeat and reallege paragraphs 1 through 39 with the same force and effect as if fully set forth herein.

58. When the Properties were being built, the City affirmatively required plaintiffs to fireproof their buildings.

59. When the Properties were being built, the City limited the materials which could be used for fireproofing to materials approved by the BSA. The BSA only approved two such materials, one of which was ACM, which effectively could be used in fireproofing steel deck structural steel buildings, such as the Properties.

60. In reliance on the BSA approval of ACM as a fireproofing material, plaintiffs used said material to fireproof their buildings.

61. Defendants have now singled out plaintiffs, and other building owners similarly situated, to bear the costs and liabilities of removing the very same ACM that defendants effectively required them to install in the Properties.

62. Manifest injustice would result if the provisions of the Local Law and Regulations are enforced by defendants insofar as said enforcement places the costs of compliance and the liabilities of non-compliance with said provisions on plaintiffs and other similarly situated building owners. Defendants are thus estopped from enforcing the Local Law and the Regulations.

EIGHTH CLAIM FOR RELIEF

63. Plaintiffs repeat and reallege paragraphs 1 through 62 with the same force and effect as if fully set forth herein.

64. Plaintiffs have, in compliance with the Local Law and Regulations, expended the amounts set forth in paragraphs 35 through 37 above which amounts were rightly the responsibility of defendants and should rightly have been expended by defendants.

65. As a result defendants have been unjustly enriched.

WHEREFORE, plaintiffs demand judgment:

a. Declaring New York City Local Law no. 76 of 1985, as amended by New York City Local Law no. 80 of 1986, and the Regulations purportedly promulgated pursuant thereto, to be, null, void and of no legal effect;

b. Enjoining defendants from taking any action to enforce said Local Laws and Regulations;

c. Awarding plaintiffs damages in an amount representing plaintiffs' cost of compliance with the Local Law and Regulations; and

d. Awarding plaintiffs such other and further relief as to the Court may seem just and proper.

Dated: New York, New York
July 21, 1988

SHEA & GOULD

By /s/Robert J. Ward
A Member of the Firm
Attorneys for Plaintiffs
1251 Avenue of the Americas
New York, New York 10020
(212) 827-3000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MELVYN KAUFMAN, et al., Plaintiffs, - against - THE CITY OF NEW YORK, et al., Defendants.	88 Civ. 5124 (RJW) AFFIDAVIT IN OPPOSITION TO MOTION TO DISMISS

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

ROBERT KAUFMAN, being duly sworn, deposes and says:

1. I am Executive Vice President of Sage Realty Corp., the managing agent of the three properties at issue here. I submit this affidavit in opposition to defendants' motion to dismiss this action for failure to state a claim upon which relief can be granted.

2. The asbestos removal work already done at the three buildings at issue here in order to comply with Local Law 76 and the Regulations purportedly promulgated thereunder has forced us physically to seal off nineteen floors at 77 Water Street for a total of approximately 950 days (at an average of 50 days per floor to remove the asbestos); two floors at 437 Madison Avenue for a total of approximately 100 days; and three floors at 127 John Street for a total of approximately 150 days.

3. Moreover, future asbestos work will force us to close six floors of 77 Water Street for a total of approximately 300 days; thirty-seven floors of 437 Madison Avenue for a total of approximately 1,850 days; and twenty-six floors of 127 John Street for a total of approximately 1,300 days.

4. The tremendous financial burden imposed on plaintiffs by the Local Law and Regulations is made particularly evident when the assessed value of each of plaintiffs' buildings is compared to the financial burdens of complying with the Law and Regulations.

(a) The structure at 77 Water Street is assessed at $19,500,000. The cost of asbestos treatment at that site will amount to approximately $8,546,401, and the total of lost rent for that building during the time spent to remove the asbestos will be approximately $1,822,398, for a total of $10,368,799, which is more than half the assessed value of the structure.

(b) The structure at 437 Madison Avenue is assessed at $46,000,000. The total cost of asbestos treatment will be approximately $21,043,984, and the total lost rent figure for that building will total approximately $6,076,978, for a total of $27,120,962, which is significantly more than half the assessed value of the structure.

(c) The structure at 127 John Street is assessed at $27,000,000. The total cost of asbestos removal there will reach approximately $11,258,847 and the total of lost rent for this building will be approximately $2,115,017, for a total of $13,373,864, which is more than half the assessed value of the structure.

5. It is also important to note that plaintiffs cannot pass the cost of asbestos treatment on to their tenants. The required treatment of asbestos is a capital charge, not a routine operating expense which can be passed on to tenants. No tenant's attorney

will allow his client to sign a lease requiring the tenant to pay such a capital expenditure. Pass-through clauses in leases deal with ongoing operating expenses like electricity or taxes, not capital expenditures. In addition, we cannot even attempt to have current tenants share the costs of asbestos treatment, because these tenants have long-term leases which predate the enactment of the legislation at issue here. Lastly, market forces alone prevent us from passing on the asbestos removal costs to our tenants. Many office buildings in New York never contained asbestos. We must compete with these buildings for tenants, and we would not stand a chance of securing tenants if we demanded higher rents, to cover asbestos removal charges, while other buildings without asbestos removal costs offered substantially lower rents.

6. As a result none of our leases have pass through clauses for asbestos removal charges nor will they ever, given market forces and the fact that such pass-through clauses deal with operating expenses, not capital charges. Further, I am unaware of any leases which have such pass through clauses in any other buildings in New York City.

7. Finally, I must note the great reluctance of private "asbestos investigators" to certify that a proposed office renovation project will not require treatment of asbestos. It has been our experience that these private uninsured citizens are greatly concerned about personal liability for their decisions and thus are not affording building owners a neutral decision on whether a particular project will require asbestos treatment under the Local Law and Regulations.

/s/ Robert Kaufman

Robert Kaufman

Sworn to before me this
28th day of October, 1988

/s/Robert J. Ward

Notary Public

FIFTH AMENDMENT TO THE CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

LOCAL LAWS
OF
THE CITY OF NEW YORK
FOR THE YEAR 1985

No. 76

Introduced by Council President (Ms. Bellamy) and Council Members Katzman and Greitzer; also Council Members Robles, Albanese, Alter, Berman, Dryfoos, Eisland, Ferrer, Friedlander, Gerges, Horwitz, Lisa, Maloney, Messinger, Michels, O'Donovan, Pinkett and Povman – (Passed under a Message of Necessity from the Mayor).

A LOCAL LAW

To amend the administrative code of the city of New York, in relation to the control of asbestos.

Be it enacted by the Council as follows:

Section 1. Declaration of legislative findings and intent. The council hereby finds that exposure to airborne asbestos fibers and particles in the air has been linked by reputable medical and scientific authorities to a significant increase in the incidence of diseases such as asbestosis, bronchogenic carcinoma, mesothelioma, and other malignancies and that substantial amounts of materials containing asbestos have been used in buildings for fireproofing, insulation, soundproofing, decorative and other purposes. The council further finds that the predominant cause of asbestos becoming airborne is due to the performance of building renovation and demolition without adequate adherence to procedures for safeguarding workers and the general public, by persons who have not received adequate training in the handling of materials containing asbestos.

Therefore, it is the purpose of this local law to safeguard the public health by requiring that renovation or demolition projects which disturb asbestos be conducted in accordance with

procedures established pursuant to the provisions of this local law and that workers who handle materials containing asbestos receive appropriate training.

§2. Article three of part one of title C of chapter twenty-six of the administrative code of the city of New York is amended by adding a new section C26-34.1 to read as follows:

§C26-34.1 Special fees; asbestos. – Whenever application for a permit is made for work which will involve the performance of an asbestos project and for which the filing with the department of an asbestos inspection report, or proof of approval by the commissioner of environmental protection of an asbestos removal plan is required, the department shall be entitled to charge an additional fee as established by the commissioner of environmental protection in an amount not to exceed eight hundred dollars. For purposes of this section, the terms "asbestos project," "asbestos inspection report" and "asbestos removal plan" shall have the meanings as are ascribed in section 1403.2-9.12 of part two of chapter fifty-seven of the code.

§3. Section C26-108.7 of sub-article 108.0 of article one of part two of such title of such chapter of such code, as amended by local law number nineteen for the year nineteen hundred eighty-three, is amended to read as follows:

§C26-108.7 Approval of application and plans. – Except as otherwise provided in section C26-111.8 and section C26-118.9, application and plans complying with the provisions of this code and other applicable laws and regulations shall be approved by the commissioner and written notice of approval shall be given the applicant promptly and no later than 40 calendar days after the submission thereof, and applications and plans failing to comply with the provisions of this code and other applicable laws and regulations shall be rejected and written notice of rejection, stating the grounds of rejection, shall be given the applicant promptly, and not later than 40 calendar days after the submission thereof, except that on or before the fortieth day, the commissioner may on good cause shown, and upon notification to the applicant, extend such times for an additional twenty

days. Whenever an application and accompanying plans have been rejected and are thereafter revised and resubmitted to meet stated grounds of rejection, the revised application and plans shall be approved if they meet the stated grounds of rejection, or shall be rejected if they fail to meet the stated grounds of rejection; and written notice of approval or written notice of rejection, stating the ground of rejection shall be given the applicant promptly and not later than 20 calendar days after the resubmission thereof.

§4. Section C26-109.4 of sub-article 109.0 of such article of such part of such title of such chapter of such code, as added by local law number seventy-six for the year nineteen hundred sixty-eight, is amended to read as follows:

C26-109.4 Application for permit. All applications for permits shall be submitted on forms furnished by the department, and shall be accompanied by the required fee. The application shall contain a general description of the proposed work or equipment, its location, and such other pertinent information as required pursuant to section 118.9 or as the commissioner may require.

§5. Section C26-113.1 of sub-article 113.0 of such article of such part of such title of such chapter of such code, as amended by such local law, is amended to read as follows:

§C26-113.1 General requirements. – All applications for demolition or removal permits shall be subject to the requirements of sub-article 109.0, section C26-11.0, section C26-118.8 and section C26-118.9.

§6. Sub-article 118.0 of such article of such part of such title of such chapter of such code is amended by adding a new section C26-118.9 to read as follows:

C26-118.9 Approval of plans and permit applications where an asbestos project is performed.

a. The commissioner shall not approve any plans pursuant to sub-article 108.0 unless an asbestos investigator has certified that the work to be performed will not constitute an asbestos project or the applicant submits with the application for approval of plans an asbestos inspection report completed in accordance with the provisions of section 1403.2-9.12 of part two of chapter fifty-seven of the code.

b. Where the commissioner of environmental protection has by regulation required that, in connection with other work for which a permit but not plans is required under this article, that an asbestos investigator certify that the work to be performed will not constitute an asbestos project or that an asbestos inspection report be completed in accordance with the provisions of section 1403.02-9.12 of part two of chapter fifty-seven of the code, the commissioner shall not issue such permit unless such certification or such report is submitted in connection with the application for such permit.

c. Where the commissioner of environmental protection has by regulation required that, in connection with work for which an alteration permit or demolition permit is required under this article, that an asbestos investigator certify that the work to be performed will not constitute an asbestos project or that the applicant submit with the application for such permit proof that an asbestos removal plan has been approved by the commissioner of environmental protection in accordance with the provisions of section 1403.2-9.12 of part two of chapter fifty-seven of the code, the commissioner shall not issue such permit unless such certification or proof of such approval has been submitted in connection therewith.

d. The commissioner shall not issue any permit under this article for work which constitutes an asbestos project and for which an asbestos inspection report is required unless the applicant at the time of application for such permit certifies on forms prescribed by the commissioner of environmental protection that he or she is familiar with federal, state and local laws and regulations applicable to asbestos related work.

e. Whenever proof of approval of an asbestos removal plan is required for plan or permit approval, any requirement for the submission of an asbestos inspection report shall be deemed waived.

f. For purposes of this section, the terms "asbestos", "asbestos inspection report", "asbestos investigator", "asbestos project" and "asbestos removal plan", shall have the meanings as are ascribed in section 1403.2-9.12 of part two of chapter fifty-seven of the code.

§7. Part two of chapter fifty seven of such code is amended by adding a new section 1403.2-9.12 to read as follows:

§1403.2-9.12 Asbestos work. — (a) For purposes of this section, the following terms shall have the following meanings:

(1) "Asbestos" shall mean any hydrated mineral silicate separable into commercially usable fibers, including but not limited to chrysotile (serpentine), arnosite (cumingtonite-grunerite), crocidolite (riebeckite), tremolite, anthrophyllite and actinolite.

(2) "Asbestos inspection report" shall mean a report on the condition of a building or structure in relation to the presence and condition of asbestos therein.

(3) "Asbestos investigator" shall mean an individual certified by the commissioner as having satisfactorily demonstrated his or her ability to identify the presence and evaluate the condition of asbestos in a building or structure.

(4) "Asbestos containing material" shall mean asbestos or any material containing more than one percent asbestos by weight.

(5) "Asbestos removal plan" shall mean a plan which will be undertaken so as to prevent asbestos from becoming airborne in the course of the alteration, renovation, modification or demolition of any building or structure.

(6) "Asbestos handling certificate" shall mean a certificate issued to a person who has satisfactorily completed an approved asbestos safety and health program.

(7) "Approved safety and health program" shall mean a program certified by the commissioner providing training in the handling and use of asbestos containing material, and safety and health risks inherent in such handling and use, together with methods for minimizing the exposure of workers and the public to asbestos fibers and, instruction in all applicable federal, state and local laws and regulations pertaining to asbestos related work.

(8) "Asbestos project" shall mean any form of work performed in connection with the alteration, renovation, modification or demolition of a building or structure which will disturb more than two hundred sixty linear feet or more than one hundred sixty square feet of friable asbestos containing material or such smaller amounts as the commissioner may establish by regulation.

(9) "Friable asbestos material" shall mean any asbestos or any asbestos containing material that can be crumbled, pulverized or reduced to powder when dry, by hand pressure.

(b)(1) It shall be unlawful for any individual to handle friable asbestos material in the course of performing work for compensation on an asbestos project unless such individual is a holder of a current, valid asbestos handling certificate.

(2) It shall be unlawful to employ or otherwise permit any individual to handle friable asbestos material on an asbestos project when such person is not a holder of a current, valid asbestos handling certificate.

(c) The commissioner shall promulgate regulations establishing procedures for the safeguarding of the health and safety of the public and all persons who work at or in the vicinity of an asbestos project.

(d)(1) The commissioner shall promulgate regulations establishing criteria for certifying individuals as eligible to receive an asbestos handling certificate and for certifying programs as approved safety and health programs. The commissioner may restrict the asbestos handling certificate as to certain supervisory and non-supervisory functions and responsibilities.

(2) The commissioner shall promulgate regulations establishing criteria for certifying individuals as asbestos investigators.

(3) Any certificate issued under this subdivision shall be valid for a period of two years unless sooner suspended or revoked and may be renewed upon submission of proof satisfactory to the commissioner that the individual continues to meet the criteria established pursuant to this subdivision.

(4) The commissioner, after providing notice and an opportunity to be heard, may suspend or revoke any certificate issued under this subdivision where it is found that the holder has failed to comply with this section or any rules or regulations promulgated thereunder.

(5) The commissioner shall charge a fee not to exceed one hundred dollars upon issuing or renewing an asbestos handling certificate and a fee not to exceed one hundred dollars upon certifying an individual as an asbestos investigator.

(e)(1) The commissioner shall prescribe forms for and the content of an asbestos inspection report to be submitted in accordance with the provisions of subdivision a of section C26-118.9 of title C of chapter twenty-six of the code. Such report shall require the furnishing of information deemed relevant by the commissioner for evaluating the scope, complexity and duration of an asbestos project, and the compliance with the provisions of this section, any regulations promulgated thereunder, and any applicable federal and or state laws or regulations.

(2) The commissioner may by regulation also require for any work which is not subject to the provisions of subdivision a of section C26-118.9 of title C of chapter twenty-six of the code and for which a permit is required under sub-article 109.0 of such title that an asbestos investigator certify that the work to be performed will not constitute an asbestos project or that an asbestos inspection report be completed and submitted to the department of building in conjunction with an application for such permit. The commissioner may exclude from any regulation promulgated pursuant to this paragraph certain types of work within a permit category.

(f)(1) The commissioner shall promulgate regulations establishing the requirements of an asbestos removal plan to be submitted in accordance with the provisions of subdivision c of section C26-118.9 of title C of chapter twenty-six of the code and shall specify the type or types of demolition and alteration work for which such submission shall be required. Plans submitted shall be approved by the commissioner only upon a satisfactory showing that such plan will effect compliance with all applicable provisions of this section, regulations promulgated thereunder, all applicable federal or state laws or regulations, and, in addition, that to the extent feasible, the removal of asbestos will be completed prior to the commencement of any demolition work. No plan shall be considered for approval unless accompanied by the payment of a fee established by the commissioner not to exceed one thousand dollars.

(2) The commissioner shall act within a reasonable time not to exceed sixty days on an application for approval of an asbestos removal plan, and shall notify the applicant in writing of his or her approval or disapproval of the application. If an application is disapproved, the commissioner shall set forth his objections in the notice of disapproval. Within sixty days after service on the applicant of the notice of disapproval, the applicant may request the commissioner to reconsider the application by responding in writing to the stated objections. The commissioner shall consider the applicant's responses to his objections, and shall notify the applicant in writing within a

reasonable time, not to exceed sixty days, of his approval or denial of the application. Failure to respond to the stated objections or request an extension of time within sixty days after service of the notice of disapproval shall be deemed a denial of the application.

(g) The commissioner may promulgate any regulations he or she deems necessary to protect the health and safety of workers and the public in connection with work not constituting an asbestos project in which asbestos is or is likely to be disturbed.

(h) A notice or order to stop work may be issued by the commissioner, or his authorized representative, at any time when it is found that work is being performed in violation of the provisions of this section, or any rules or regulations promulgated thereunder and which poses a threat to human safety. Such notice or order may be given orally or in writing to the owner, lessee or occupant of the property involved, or to the agent of any of them, or to the person or persons performing the work and may require all persons in or about the building or premises to vacate the same forthwith, and also require such work to be done as, in the opinion of the commissioner, may be necessary to remove any danger therefrom. Such notice or order shall be valid for a period of time not to exceed seventy-two hours and may be extended only upon application to the board in accordance with the provisions of section 1403.2-15.01 of this code.

(i) The commissioner may promulgate any additional regulations he or she deems necessary to effectuate the purposes of this section.

§8. The table of civil penalties contained in subparagraph A of paragraph five of subdivision b of section 1403.2-15.01 of such part of such chapter of such code, as added by local law number seventy-five for the year nineteen hundred eighty-two, is amended by inserting between the penalty prescribed for a violation of section 1403.2-9.11(f) and the penalty prescribed for a violation of section 1403.2-9.13 the following penalties:

	Civil Penalties	
	Maximum	Minimum
1403.2-9.12; provided that such $1,000-$10,000 penalty shall not apply to violations of 1403.2-9.12 (b)(1)	10,000.00	1,000.00
1403-2-9.12 (b)(1)	1,000.00	250.00

§9. Within eighteen months of the enactment of this local law, the commissioner of environmental protection shall submit to the council a report identifying and evaluating the potential risks, if any, which may be posed to workers and the general public from asbestos which is not disturbed by renovation, alteration or demolition work and recommending action deemed appropriate to ameliorate such risks as may be identified.

§10. This local law shall take effect sixty days after its enactment into law except that section C26-118.9 of article one of part two of the administrative code of the city of New York as added by section six of this local law and paragraphs one and two of subdivision b of section 1403.2-9.12 of part two of chapter fifty-seven of the administrative code of the city of New York as added by section seven of this local law shall take effect one year after its enactment.

THE CITY OF NEW YORK, OFFICE OF THE CITY CLERK, s.s.:

I hereby certify that the foregoing is a true copy of a local law of The City of New York, passed by the Council on November 19, 1985, and approved by the Mayor on December 2, 1985.

DAVID N. DINKINS, City Clerk, Clerk of the Council.

CERTIFICATION PURSUANT TO MUNICIPAL HOME RULE LAW § 27

Pursuant to the provisions of Municipal Home Rule Law § 27, I hereby certify that the enclosed local law (Local Law 76 of 1985, Council Int. No. 891-B) contains the correct text and, received the following vote at the meeting of the New York City Council on November 19, 1985: 35 for, 0 against.

Was approved by the Mayor on December 2, 1985.

Was returned to the City Clerk on December 3, 1985.

HADLEY W. GOLD, Acting Corporation Counsel.

Supreme Court, U.S.
FILED
MAY 4 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 89-1412

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

MELVYN KAUFMAN, 77 WATER STREET, INC., 77 WATER STREET ASSOCIATES, 127 JOHN STREET FEE ASSOCIATES, 127 JOHN STREET ASSOCIATES, 437 MADISON AVENUE FEE ASSOCIATES, and 437 MADISON AVENUE ASSOCIATES,

Petitioners,

-against-

THE CITY OF NEW YORK, THE ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK, EDWARD I. KOCH, in his capacity as Mayor of the City of New York, HARVEY W. SCHULTZ, in his capacity as Commissioner of the Department of Environmental Protection, and CHARLES M. SMITH, JR., in his capacity as Commissioner of the Department of Buildings,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

VICTOR A. KOVNER,
Corporation Counsel of the
City of New York,
Attorney for Respondents,
100 Church Street,
New York, New York 10007.
(212) 566-4329 or 4338

LEONARD J. KOERNER,*
PAMELA SEIDER DOLGOW,
JULIAN BAZEL,
ELIZABETH S. NATRELLA,
of Counsel.

April 23, 1990

*Attorney of Record

BEST AVAILABLE COPY

COUNTER-QUESTIONS PRESENTED

1. On this record and based on substantial precedent, did petitioners' complaint, challenging the facial constitutionality of the City of New York's asbestos removal laws, enacted to combat a serious public health and safety threat, state a claim for an unconstitutional taking, where the laws are tied to a voluntary decision by the building owners to do alteration or demolition work which disturbs "friable" asbestos, and where petitioners do not even allege that they are unable to make a profit, nonetheless, that they are deprived of any economically viable use of their property?

2. Does a controversy ripe for judicial review exist where petitioners, holders of fee or leasehold interests in three

commercial office buildings who assert claims of "future" costs and "future" lost rents of over $40,000,000 in their complaint, have an available variance process under Local Law No. 46 of 1988?

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No. 89-1412
IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

MELVYN KAUFMAN, 77 WATER STREET, INC., 77 WATER STREET ASSOCIATES, 127 JOHN STREET FEE ASSOCIATES, 127 JOHN STREET ASSOCIATES, 437 MADISON AVENUE FEE ASSOCIATES, and 437 MADISON AVENUE ASSOCIATES,

Petitioners,

-against-

THE CITY OF NEW YORK, THE ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK, EDWARD I. KOCH, in his capacity as Mayor of the City of New York, HARVEY W. SCHULTZ, in his capacity as Commissioner of the Department of Environmental Protection, and CHARLES M. SMITH, JR., in his capacity as Commissioner of the Department of Buildings,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STATEMENT OF THE CASE

The instant case concerns the efforts of petitioners Melvyn Kaufman et al.

("petitioners"), holders of fee or leasehold interests in three commercial office buildings in Manhattan, to challenge the facial constitutionality of laws and regulations enacted by respondents, the City of New York, et al. ("the City"),[1] governing the removal of asbestos in buildings for the public health and welfare. The laws apply only where the owners' voluntary decision to do renovation, alteration or demolition work will disturb "friable" asbestos, thus causing harmful asbestos to become airborne.

Petitioners' complaint alleges that: (1) they have incurred about $8,500,000 in asbestos abatement costs associated with their voluntary alteration and renovation

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[1]The named defendants-respondents are the City of New York, its Environmental Control Board, the former Mayor, and the former Commissioners of the Department of Environmental Protection and the Department of Buildings.

work and about $1,500,000 in lost rent; and (2) they "will continue to be injured" by "future" abatement costs of about $32,000,000 and "future" lost rents of about $8,500,000 (A35-A36, ¶¶35-37, Pet., p. 4, n.3). The complaint does not allege that petitioners have lost the economically viable use of their property, that they are unable to continue to operate these commercial office buildings for their intended use, nor even that they cannot make a profit. It also does not acknowledge that there is an available variance process as to the alleged "future" $40,000,000 loss.

Petitioners seek to have this Court review by way of certiorari an order and judgment of the United States Court of Appeals for the Second Circuit, entered December 8, 1989, which affirmed a judgment of the United States District Court for the Southern District of New York, entered May

26, 1989. Upon the City's motion, the District Court dismissed the complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6). Petitioners' unsuccessful federal constitutional claim has two aspects: (1) a due process challenge, now nominally dropped in this Court; and (2) an unconstitutional taking claim. Neither deserves review.

Indeed, respondents are forced to set the record straight. This case is not novel in takings jurisprudence, but for petitioners' distortion of the governing statutory and regulatory scheme. Once that scheme is understood, it is clear that petitioners have not stated a claim for a taking without just compensation, given the controlling legal principles set forth by this Court, which are largely unacknowledged by petitioners.

1. The Statutory and Regulatory Scheme Governing Asbestos Removal

In the wake of increasing knowledge about the dangers of asbestos, once thought to be a "wonder material" and commonly used in building construction, the City of New York enacted a comprehensive regulatory scheme to protect the public health and safety. Environmental Encapsulating Corp. v. The City of New York, 855 F.2d 48, 50-52 (2d Cir., 1988).

". . . [B]efore the deadly hazards of asbestos were realized, more than half of the high-rise commercial buildings built in the City between 1958 and 1972 used asbestos as fireproofing," virtually every boiler room has it, and New York City buildings have an estimated 3.5 million tons of asbestos. Id. at 50. Prior to 1971, there were two methods approved by the New York City Board of Standards and Appeals for use in the City of New York for fireproofing of steel structural

members in building construction. One was certain approved asbestos products, often sprayed onto the steel members, and the other was cementitious materials, i.e., sprayed cement or concrete block. The choice of which method to use lay solely with the owner.

In 1972, in response to then identified public health hazards, the City completely banned the use of sprayed asbestos in building construction, effective February 1972. N.Y.C. Admin. Code, §24-146.

Thereafter, in December 1985, the City Council enacted Local Law No. 76 of 1985 ("Local Law 76") to address the public health hazards posed by voluntary alteration or demolition work in buildings containing asbestos and to regulate asbestos abatement activities. N.Y.C. Admin. Code, §§24-146.1

and 27-198.1.[2] In particular, many of the asbestos-containing materials already present in buildings are subject to crumbling or powdering when they are touched or otherwise disturbed, with the result that "friable" asbestos fibers become airborne. The "Declaration of Legislative Findings and Intent" for Local Law 76 states that (see, Environmental Encapsulating Corp., supra, 855 F.2d at 51):

> The council hereby finds that exposure to airborne asbestos fibers and particles in the air has been linked by reputable medical and scientific authorities to a significant increase in the incidence of diseases such as asbestosis, bronchogenic carcinoma, mesothelioma, and other malignancies and that substantial amounts of materials containing asbestos have been used in buildings for fireproofing, insulation, soundproofing,

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[2]In December 1986, the City Council enacted Local Law No. 80 of 1986, which amended certain provisions of Local Law 76, not at issue here.

decorative and other purposes. The council further finds that the predominant causes of asbestos becoming airborne are due to the performance of building renovation and demolition without adequate adherance [sic] to procedures for safeguarding workers and the general public, by persons who have not received adequate training in the handling of materials containing asbestos.

Therefore, it is the purpose of this local law to safeguard the public health by requiring that renovation or demolition projects which disturb asbestos be conducted in accordance with procedures established pursuant to the provisions of this local law and that workers who handled materials containing asbestos receive appropriate training [3](Emphasis added in Court opinion).

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[3]Without any basis, and completely ignoring this legislative declaration, petitioners attack Local Law 76 as "an arbitrary act of political expediency" and the City's actions as "cavalier" (Pet., pp. 4-5). Not only do petitioners ignore the fact that they themselves, their tenants and the public benefit from the removal of harmful "friable" asbestos in their voluntary renovation work, but the legislation is presumptively constitutional, and speculative, lurking or hidden legislative motivations do not come

(Footnote Continued)

Local Law 76 established an asbestos abatement program which requires that the presence and condition of asbestos be ascertained before any building alteration, renovation or demolition work is performed, and that the asbestos either be sealed in place or removed if the work would disturb

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(Footnote Continued)
into play (see A25, n.13). Once the Court makes the limited inquiry as to whether the law bears a rational relationship to the public health and welfare, it may not go beyond that to examine its wisdom or need. See, e.g., Caban v. Mohammed, 441 U.S. 380 (1979); Day-Brite Lighting v. State of Missouri, 342 U.S. 421, 423 (1952).

In any event, the District Court recognized that Local Law 76 was passed in 1985, in part, as a result of increased knowledge and advances in science as to the health risks of asbestos (A14-A15); it is well-accepted that, based on continuing scientific and federal agency reviews in the 1980's, more developed risk assessments and studies served as the scientific basis for further regulations. Cf. Environmental Encapsulating Corp., supra, 835 F.2d at 50, and Record on Appeal therein, Affidavit of William H. Nicholson, Ph.D., dated May 4, 1987, also submitted as background in this case in the Joint Appendix below at JA50-JA51, JA55.

it and cause it to become airborne. Thus, before any such work, an applicant for a building permit must file either a certification that the work to be performed will not constitute an "asbestos project," or submit an "asbestos inspection report" which sets forth the condition of the building as to the presence and condition of asbestos. N.Y.C. Admin. Code, §27-198.1(a).[4] A certification that building work does not constitute an asbestos project must be

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[4]Local Law 76 defines "asbestos project" as any work in connection with the alteration, renovation, modification or demolition of a building which will disturb more than 260 linear feet or 160 square feet of "friable" asbestos containing material, or lesser amounts which the commissioner may establish by regulation. N.Y.C. Admin. Code, §24-146.1(a)(8). It defines "asbestos containing material" as asbestos or any material containing more than 1% asbestos by weight, and such material is defined as "friable" if it can be crumbled, pulverized or reduced to powder when dry, by hand pressure. N.Y.C. Admin. Code, §24-146.1(a)(4), (9).

prepared by an individual certified by DEP as having "satisfactorily demonstrated his or her ability to identify the presence and evaluate the condition of asbestos in a building and structure," i.e., an "asbestos investigator." N.Y.C. Admin. Code, §24-146.1(a)(3). The law requires that all asbestos abatement activities be conducted in accordance with approved safety procedures and be performed by persons with appropriate training and certification to minimize the threat to the public from asbestos removal.

The law does not require the sealing or removal of any asbestos which is not being disturbed or will not be disturbed by such work.

The asbestos abatement program is administered by the Department of Environmental Protection and its Commissioner (hereafter "DEP"), consistent

with its mandate "to preserve, protect and improve the air resources of the City so as to promote health, safety and welfare" and to prevent injury to human life. City Charter, §1403(c); N.Y.C. Admin. Code, §24-102. In response to Local Law 76's delegation to "establish ... procedures for the safeguarding of the health and safety of the public and all persons who work at or in the vicinity of an asbestos project", N.Y.C. Admin. Code, §24-146.1(c), DEP adopted rules and regulations governing asbestos abatement activities in March 1987, and later amended.[5] See DEP, Rules and Regulations

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[5]In addition, the alteration, renovation and demolition of buildings in New York City is subject by law to the regulation of the Department of Buildings. See N.Y.C. Charter, §§645(b)(1), (2). Aside from an owner's common law duty, an owner of a building is charged with the responsibility "at all times" for the safe maintenance of the building and its facilities. N.Y.C. Admin.
(Footnote Continued)

of the New York City Asbestos Control Program, §§8000-8405.

Notably, there are certain activities under the regulations which presumptively do not constitute alteration or renovation work involving "friable" asbestos material, including work on awnings, newsstands, parapet walls, fire escapes, and the replacement of exterior water tanks. For such activities, no notification is required unless "friable" asbestos material is discovered. Id., §§8101, 8152. However, where the alteration or renovation work will disturb "friable" asbestos material, the regulations require the filing of an asbestos

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(Footnote Continued)
Code, §27-128. Owners can be ordered to correct unsafe conditions on their property and to abate a public nuisance. N.Y.C. Admin. Code, §§26-115 et seq., 17-142 et seq.

inspection report, together with a specified filing fee. Id., §§8101, 8152.

With respect to the actual conduct of asbestos abatement work, the DEP Regulations specify approved procedures and technical standards for air sampling, monitoring and analysis (§8170 et seq.); materials and equipment (§8190 et seq.); workplace preparation, decontamination, and entry and exit procedures (§8210 et seq.); asbestos abatement procedures, (§8230 et seq.); and clean-up procedures (§8240 et seq.).[6]

In essence, these regulations require that the area where the abatement work is to be performed be isolated by means of plastic

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[6]In December 1986, DEP adopted Rules and Regulations Governing Training of Asbestos Handlers, Asbestos Handler Supervisors, and Asbestos Investigators. §§8110-8146; see Environmental Encapsulating Corp., supra, 855 F.2d at 51-52, 60-62.

barriers and the sealing or reverse pressurization of the heating, ventilation and air conditioning system; that the air be monitored for asbestos before, during and after the work; that decontamination facilities be installed and strict entry and exit procedures instituted to prevent the escape of asbestos from the work area on clothes or equipment; and that the asbestos be properly bagged for disposal or sealed in place. The regulations do not require that buildings in which asbestos abatement work is being performed be evacuated, except, of course, the area in which the work is being performed, and any areas which cannot be isolated from the work area.

Finally, in May 1988, Local Law No. 46 of 1988 ("Local Law 46") amended the Administrative Code to allow for individual variances from the requirements of Local Law 76 and the regulations for specific asbestos

projects. N.Y.C. Admin. Code, §24-146.1(i). Variances may be granted if adequate proof is presented that compliance with particular requirements related to asbestos removal or encapsulation would impose unreasonable hardship. Id. In granting a variance, such conditions "as the policies of [the Administrative] Code may require" may be imposed. Id., Local Law 46 at §7(i).[7]

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[7]Section 7 of Local Law 46 provides:

> [t]he commissioner [of the DEP] may grant individual variances for asbestos projects at specific sites, from particular requirements related to asbestos prescribed by this code and regulations or orders of the commissioner promulgated thereunder, whenever it is found, upon presentation of adequate proof, that compliance with such requirements would impose unreasonable hardship. In granting a variance the commissioner may impose such conditions as the policies of this
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> (Footnote Continued)

2. **The Litigation History and Opinions Below**

Petitioners filed a complaint against the City of New York, et al., on July 22, 1988 (A27-A43). They sought a judgment: (a) declaring Local Law 76 of 1985, as amended, and the corresponding regulations unconstitutional, null and void; (b) enjoining the City from enforcement; and (c) awarding damages representing their cost of compliance (A42-A43).

The first claim is the only federal constitutional claim (A36-A38, ¶41), with the others various state law claims including an estoppel claim. As noted, the federal claim

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(Footnote Continued)

> code may require and shall publish in the City Record no later than seven days after the granting of such variance a statement of the reasons leading to his or her decision.

N.Y.C. Admin. Code, §24-146.1(i). See also DEP Regulation §8102 (variance procedure).

has two aspects: (1) that the asbestos removal laws and regulations violate their due process rights; and (2) that they constitute a taking of property without just compensation.

Upon the City's motion, the United States District Court for the Southern District of New York (Ward, U.S.D.J.), granted the motion to dismiss the federal claim for failure to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6). It also dismissed the pendent state claims for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). See A5-A26; Kaufman v. The City of New York, 717 F. Supp. 84 (S.D.N.Y., 1989).

On appeal, the United States Court of Appeals for Second Circuit unanimously affirmed the judgment below (A1-A4; Kaufman v. The City of New York, 891 F.2d 446 (2d Cir., 1989) (per curiam)). Upon

review of all of the parties' contentions (A2-A4), the Court of Appeals affirmed "substantially for the reasons given" in the District Court's "careful and comprehensive opinion" (A4).

In brief, the taking claim was found meritless under recent and controlling precedent from this Court (A19-A25). Rejecting the physical occupation claim in light of the "narrow" ruling in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982), the courts recognized that Local Law 76 is a regulation on the use of property, which only applies if the owner seeks to use it in a manner which threatens to make asbestos airborne (A19-A21). Unlike Loretto, supra, and Kaiser Aetna v. United States, 444 U.S. 164, 179-180 (1979), "Local Law 76 and the regulations clearly allows plaintiffs to maintain all their rights of control" over their property and "the

manner in which compliance with the law is achieved" (A22 & n.12). In sum (A22-A23):

> Despite [plaintiffs'] diligent attempts to characterize Local Law 76 as a physical invasion of their property, the law simply regulates the uses that they can make of the buildings, and does so in a rather narrow manner. The ability to renovate the buildings is conditioned on the protection of the public from the dangers associated with airborne asbestos. Plaintiffs are free to use the buildings without making alterations or to make alterations that do not present a public health hazard by causing asbestos to become airborne. If plaintiffs choose either of these alternatives, the strictures of Local Law 76 can be completely avoided. The extent of any alteration work to be performed, and therefore the extent of the cost of compliance with the law for any asbestos project, is solely left to the discretion of plaintiffs. Furthermore, plaintiffs continue to control the activities that occur in their buildings and remain able to supervise or dismiss the qualified individuals they voluntarily choose to retain to perform the asbestos removal work. It is plaintiffs who remain ultimately responsible for compliance with the requirements of Local Law 76. Their ownership

> rights in the property are not significantly diminished by the requirements of asbestos removal.

So too, under well-established precedent (see A23 and cases cited therein), there was no claim because ". . . valid zoning laws which prohibit an entire use of property result in more severe hardship on property owners than Local Law 76, which only adds to the cost of a specific use of property dangerous to the public, and leaves the final choice on how to use the property in the hands of the owner" (A24).

Furthermore, petitioners failed to allege a sufficient diminution in value or use of their buildings caused by Local Law 76 to state a claim, since there is no allegation that the buildings will be robbed of all economic use, ¶¶ 34-38, or that the law will force them to give up the general use of their property as office buildings, nor even that the operation of their buildings will be

unprofitable (A24, citing Keystone Bituminous Coal Association v. De Benedictis, 480 U.S. 470, 495-496 (1987)) ("petitioners have not claimed . . . the Act makes it commercially impracticable for them to continue mining . . . Indeed, petitioners have not even pointed to a single mine that can no longer be mined for profit").[8]

In sum, "Local Law 76 and the regulations impose additional costs on plaintiffs as incident to their ownership of property, but these costs are well within the

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[8]The District Court noted that petitioners are not required to seal off the entire building while asbestos is removed under the regulations, only those sections which will be affected by the alteration work (A24). Accordingly, those parts of the building not being renovated are fully available for their use and economic benefit and the buildings continue to be used as office buildings, "a reflection of [petitioners'] own determination that the benefits of continued operation outweigh the costs of compliance with Local Law 76" (A24-A25).

scope of the City's police powers. Accordingly, plaintiffs ... failed to state a constitutional takings claim" (A25).

REASONS FOR DENYING THE WRIT OF CERTIORARI

THE CITY'S ASBESTOS REMOVAL LAWS AND REGULATIONS ARE A CONSTITUTIONAL EXERCISE OF ITS POLICE POWERS AND DO NOT CONSTITUTE AN UNCONSTITUTIONAL "TAKING" OF PETITIONERS' PROPERTY. ADDITIONALLY, THERE IS AN AVAILABLE VARIANCE PROCESS, MAKING THE CLAIM PREMATURE.

To succeed in their facial challenge to the constitutionality of the asbestos removal laws, petitioners had to show that "no set of circumstances exists under which the Act would be valid." United States v. Salerno, 481 U.S. 739, 745 (1987). Petitioners failed to do so. Rather, based on ample precedent, particularly as to public health, safety and welfare regulations, see, e.g., Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470 (1987), the

instant case does not warrant review. As shown below, petitioners do not establish: (1) any facts arising to the level of an unconstitutional taking or other claim; or (2) that their claim is ripe for review.

1. **The Valid Exercise of the Police Power**

Although petitioners nominally raise only a taking claim in this Court, their purported analysis of that claim makes clear that they once again challenge the City's exercise of its police powers (Pet., passim). Nonetheless, it is well-settled that economic and social welfare legislation satisfies due process if it is rationally related to a legitimate governmental objective. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

"A legitimate governmental purpose is, of course, one which furthers the public health, safety, morals or general welfare." Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926). Every statute is

entitled to "a strong presumption of constitutionality," Califano v. Aznavorian, 439 U.S. 170, 175 (1978); Mathews v. De Castro, 429 U.S. 181, 185 (1976), based on the principle that courts will "not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy it expresses offends the public welfare." Day-Brite Lighting, Inc. v. State of Missouri, 342 U.S. 421, 423 (1952).

Plaintiffs maintain that because they constructed their buildings in accordance with applicable building regulations at a time when asbestos was one of two approved building materials, the costs of asbestos abatement cannot be imposed on them, but rightly lie with the City (A36-A38, ¶41(a), A42, ¶64). However, in the exercise of its police power to protect the public health, safety and welfare, the City can require property owners to comply with new safety

measures, even where such measures necessitate costly improvements on existing, lawfully constructed buildings.

The clearly legitimate governmental objective underlying the challenged Local Law 76 is the protection of the public from the serious health dangers, including asbestosis and carcinoma, posed by airborne asbestos. Environmental Encapsulating Corp., supra, 855 F.2d at 50-52; see ante, p. 6. Thus, the asbestos abatement program, as a land use regulation directly and reasonably related to the stated legislative purpose, is a "constitutionally valid use of [the] state's police power." Id. at 53. Cf. Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 442 (1960) ("Legislation designed to free from pollution the very air that people breathe clearly falls within . . . police power"). Significantly, the complaint does not allege that asbestos

does not present a public health hazard, nor that asbestos abatement is not a proper subject of the City's police power. See also Railway Express Agency Inc. v. New York, 336 U.S. 106, 108-109 (1949).

While the challenged laws and regulations do impose certain obligations on building owners to ensure compliance with the law, such a requirement is unexceptional. As this Court held in Keystone, supra, 480 U.S. at 491-492 (1987):

> Under our system of government, one of the state's primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others. . . . These restrictions are "properly treated as part of the burden of common citizenship." . . . Long ago it was recognized that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to

> the community...." (citations omitted).

See also Andrus v. Allard, 444 U.S. 51, 65 (1979), citing Penn Central Transportation Co. v. New York City, 438 U.S. 104, 123-128 (1978) (government regulation by definition involves the adjustment of rights for the public good; "often this adjustment curtails some potential for the use or economic exploitation of private property").

The leading case for the principle that even owners of lawfully constructed buildings can be compelled in the name of public safety to make improvements to their property, even at great expense, is Queenside Hills Realty Co. v. Saxl, 328 U.S. 80 (1946).

There, in upholding a challenge to the constitutionality of a New York law requiring that all lodging houses install an automatic wet sprinkler pipe system as a fire safety measure, despite compliance with all

applicable laws some four years earlier, this Court declared (id. at 81-83):

> Little need be said on the due process question. We are not concerned with the wisdom of this legislation or the need for it. Protection of the safety of persons is one of the traditional uses of the police power of the States. ... It is for the legislature to decide what regulations are needed to reduce fire hazards to a minimum. Many types of social legislation diminish the value of the property which is regulated. The extreme cases are those where in the interest of the public safety or welfare the owner is prohibited from using his property. We are dealing here with a less drastic measure. But in no case does the owner of property acquire immunity against exercise of the police power because he constructed it in full compliance with the existing laws. The police power is one of the least limitable of governmental powers, and in its operation often cuts down property rights. ... [A] statute may be sustained though some of the objects affected by it may be wholly innocent. The question of validity turns on the power of the legislature to deal with the prescribed class. That power plainly exists here. (emphasis added) (citations omitted).

Accord, Andrus v. Allard, 444 U.S. 51 (1979) (fact that artifacts were lawfully acquired does not preclude government from prohibiting their sale); Hadacheck v. Sebastian, 239 U.S. 394, 410 (1915) ("A vested interest cannot be asserted against [the police power] because of conditions once existing").[9]

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[9] In a pertinent State case, McCallin v. Walsh, 64 A.D.2d 46 (1st Dept.), aff'd on opin. below sub nom. Kaufman v. O'Hagan, 46 N.Y.2d 808 (1978), plaintiff Melvyn Kaufman, one of the instant petitioners, challenged on constitutional and state law grounds virtually identical to the instant ones, a New York City law which required the installation of costly alarm, communication, elevator-recall and sprinkler/smoke-control systems, and the adoption of a fire safety plan in 870 existing office buildings, including those herein. Relying on Saxl, the New York Courts upheld the constitutionality of the local law, based on the "... well established principle that a legislature may, as a proper exercise of the police power, require building owners to make improvements essential to the reduction of fire hazards." Id., 64 A.D.2d at 59.

Try as they may to avoid these legal principles, the fact is that petitioners' claims rest on the fundamentally flawed premise that an owner's "reliance" on existing building codes gives rise to a vested right, which renders any subsequent safety requirements an unconstitutional taking without just compensation. They argue that the challenged laws and regulations are the "retroactive" imposition of an affirmative requirement that plaintiffs "rectify prior [City] mistakes" by removing asbestos originally installed at the City's "direction" (Pet., p. 3, 6-7). Simply put, while they may fancy themselves as having brought a "case of first impression" (Pet., p. 3), they improperly seek to bootstrap an equitable estoppel argument into a constitutional deprivation.

At the outset, notwithstanding their litany that the City's "directed" them to

install asbestos (Pet., passim), the fact is, of course, that the City never required the use of asbestos; it required fireproofing. To accomplish this public safety purpose, the City approved building materials containing the two widely-accepted and effective fireproofing technologies: cement and asbestos (A30, ¶18). Petitioners were free to use either material, based on their own assessment of relevant factors including relative utility and cost.

In any event, their attempt to insulate themselves from the above controlling principles of law through the subterfuge of unconstitutional "retroactivity" (Pet., pp. 6-15) must be rejected based on the above discussion and for all the reasons stated by the District Court (A15-A17).

Petitioners cannot even show that the laws are retroactive because obviously all new safety measures require the "undoing,"

to some degree, of prior lawful construction. See Saxl, supra. This Court cited Saxl with approval in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), stressing that it had consistently affirmed the State's broad power to regulate landlord-tenant relationships without paying for all ensuing economic injuries. Id. at 440. Thus the Loretto holding "in no way alters" the State's power to require compliance with building codes and to require provision of "smoke detectors, fire extinguishers and the like ...." Id.[10]

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[10] See also Oriental Boulevard Co. v. Heller, 27 N.Y.2d 212 (1970), app. dismissed, 401 U.S. 986 (1971) (law requiring installation of air pollution control equipment held constitutional); Tenement House Dept. of City of New York v. Moeschen, 179 N.Y. 325, 333-335 (1904), aff'd, 203 U.S. 583 (1906) (law requiring installation of individual water closets held constitutional, notwithstanding its application to existing building constructed in compliance with administrative order).

Whether the threat is from fire or asbestos, the principle is the same: even faultless property owners can be required to assume the burden of rectifying conditions on their premises which the legislature has determined jeopardize public health, safety or welfare. See A14, n.7 and Heckler v. Community Health Services, 467 U.S. 51, 60 (1984) (application of equitable estoppel against government only in very limited and unusual circumstances, for to do otherwise ". . . would frustrate the Government's ability to enforce the law and, in turn, undermine the public interest in full enforcement of the law").[11]

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[11] See also United States v. Boccanfuso, 882 F.2d 666 (2d Cir., 1989) (no estoppel from enforcement of Clean Water Act); United States v. Northeastern Pharmaceutical & Chemical Co., 810 F.2d 726, 734 (8th Cir., 1986), cert. denied, ___U.S.___, 108 S.Ct. 146 (1987) (retroactive application of

(Footnote Continued)

For all these reasons, petitioners do not state any type of due process claim and their attempts to constitutionalize an estoppel claim are baseless.

2. The Taking Claim

Turning to petitioners' direct challenge that the City's asbestos removal laws and regulations on their face are an unconstitutional taking of their property, there are two threshold obstacles they fail to overcome: (1) they have an available variance process (post, pp. 50-51), and (2) facial taking challenges are especially disfavored by this Court. Pennell v. City of San Jose, supra, 485 U.S. at 11-14; Keystone, supra, 480 U.S. at 494. In any

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(Footnote Continued)
Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §9607, for the legitimate legislative purpose of cleanup of abandoned hazardous waste does not violate due process nor constitute an unconstitutional taking).

event, the laws in no way appropriate their property for the use of any governmental authority or agency or otherwise result in a permanent physical occupation. Petitioners, who do not even attempt to argue that the law does not advance a substantial government interest, fail to meet the heavy burden of showing that the "mere enactment" of the law has deprived them of all beneficial, economically viable use of the property.

Regardless of petitioners' unsupported argument (Pet., pp. 6-14), this Court draws a clear distinction between "a permanent physical occupation" and a "regulation that merely restricts the use of property." Loretto v. Teleprompter Manhattan CATV Corp., supra, 458 U.S. at 430. Compare Penn Central Transportation Co. v. New York City, 438 U.S. 104, reh. denied, 439 U.S. 883 (1978). The distinction involves

the difference between an "actual ... invasion of the land, amounting to an appropriation of, and not merely an injury to, the property" (Loretto, supra, 458 U.S. at 428), and an interference with property that "arises from some public program adjusting the benefits and burdens of economic life to promote the common good" (Penn Central, supra, 438 U.S. at 124).

A. Physical Taking Claim

Petitioners do not fall within the "very narrow" holding of Loretto, 458 U.S. at 441, since there is no permanent physical occupation. See F.C.C. v. Florida Power Corp., 480 U.S. 245, 251 (1987). Here, Local Law 76 and the DEP regulations, on their face, do not require the appropriation of private property for City or public occupancy. Rather, they are plainly regulatory in nature. Any interference with petitioners' property arises from the

Legislature's determination that the benefit a building owner derives from the ability to alter or demolish his property must be balanced with the burden of ensuring that the public health, safety and welfare is not jeopardized thereby by exposure to airborne asbestos. Cf. Keystone, supra, 480 U.S. at 470, 476-477, 488 n.18 (1987); Mugler v. Kansas, 123 U.S. 623, 665, 668-670 (1887).

Despite the clear statutory language, petitioners continue to make the false assertion that the City's asbestos laws and regulations "affirmatively require" them "to seal off and close portions of their buildings", thus allegedly showing that there is government-mandated "physical interference with [their] buildings" (Pet., p. 12). Try as they will to confuse the issue, the distinction between a regulatory impact and a physical taking is clear. It is obvious from the case law that it may be

necessary temporarily or even permanently to close off part of a building to carry out the alterations required to comply with new safety measures, but such laws do not interfere with private ownership and control, and any work that is done is performed under the owner's direction.

In addressing a far closer question, this Court held that a law that permanently closed 50% of the plaintiff's subsurface land to mining beneath protected buildings and land as a means of providing surface support "of course" involved "land use regulation, not a physical appropriation of ... property." Keystone, supra, 480 U.S. 489, n.18. While petitioners do not acknowledge Keystone at all, even the dissenting opinion therein provides two key distinctions from the instant case: (1) there is an undisputed "discrete and narrow" purpose here to promote public health and safety; and (2)

there is no "complete extinction" or "destruction" of petitioner's property. Id., 480 U.S. at 513.

Petitioners disingenuously try to come under Loretto's "permanent physical occupation" standard, without even acknowledging that they asserted below that the alleged taking "to date" was "temporary" (Pl.-App. br., 2d Circuit, 8/14/89, p. 18). So too, their reliance on Kaiser Aetna v. United States, 444 U.S. 164 (1979) (Pet., pp. 6, 9, 12-13) is misplaced. Kaiser Aetna, as Loretto, is easily distinguished as involving actual physical appropriations of property, i.e., the requirement that the property owner open his marina to the public, and this Court expressly rejected the argument that the government could be "estopped" by official consent. Id. at 179-180. Here, the City has in no way physically invaded petitioners' property by

depriving them of their "right to exclude" the public from their premises, the "fundamental element" of property ownership emphasized by this Court. Id., 444 U.S. at 179-180.

Finally, petitioners' "confiscatory" taking cases (Pet., pp. 9-10) are inapposite, and evidence no conflict with this case. First, those cases involve the issuance and revocation of permits and rezoning only, and not the unquestioned government power to regulate building codes and require compliance with new safety laws. Further, they still require a showing of "onerous" regulation, either by deprivation of economically viable use, or by actual appropriation by government title or occupation. Neither showing is made here.

B. **Regulatory Taking Claim**

The law is clear that a land use or zoning statute "does not effect a taking if it

'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.' " Nollan v. California Coastal Commission, 483 U.S. 825, 834 (1987), quoting Agins v. Tiburon, 447 U.S. 255, 260 (1980). Accord, Keystone, supra, 480 U.S. at 485. As set forth above, ante, pp. 24-35, the City's asbestos laws and regulations constitute a lawful exercise of the City's police power and substantially advance the public health, safety and welfare.

The Fifth Amendment, applied to the States through the Fourteenth Amendment (Penn Central, supra, 438 U.S. at 122), is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Armstrong v. United States, 364 U.S. 40, 49 (1960). Nevertheless, "Government could hardly go

on if to some extent values incident to property could not be diminished without paying for every such change in the general law." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

Here, even if, arguendo, petitioners were unable to earn a reasonable rate of return, there would still be no unconstitutional taking in this case, given the overriding and critical legislative purpose to protect the health and safety of citizens. See Saxl, supra; Loretto, supra, ante, pp. 28-33.

In the land use area, this Court "uniformly reject[s] the proposition that diminution in property value, standing alone, can establish a taking." Penn Central, supra, 438 U.S. at 133. This is true even where the challenged regulation prohibits the most profitable or beneficial use of the property. Id. at 124-125. See also

Goldblatt v. Hempstead, 369 U.S. 590, 592 (1962) (ban on using gravel pit as quarry). Indeed, this Court "has repeatedly upheld regulations that destroy . . . real property interests" and has never required the courts to calculate whether a specific individual has suffered burdens in excess of benefits received. Keystone, supra, 480 U.S. at 488 n.18 and 491 n.21. See also Andrus v. Allard, 444 U.S. 51 (1979); United States v. Central Eureka Mining Co., 357 U.S. 155 (1958); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

In evaluating the economic impact of a government regulation on a particular property, one must look to the property as a whole (Keystone, supra, 480 U.S. at 497, quoting, Penn Central, supra, 438 U.S. at 130-131). Only where the economic impact of a government regulation so adversely affects an owner's property rights or so interferes

with distinct "investment-backed expectations" that an owner is deprived of any "economically viable use of his land", can there be said to be a taking. Keystone, supra, 480 U.S. at 495, 499. See Penn Central, supra, 438 U.S. at 127-128. In fact, reductions of values of more than 90% have been held constitutional.[12]

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[12]The courts have repeatedly sustained government regulations which have caused radical reductions in property values. See, e.g., Village of Euclid, supra (75% reduction in property value); Hadacheck v. Sebastian, supra (92.5% reduction in property value, from $800,000 to $60,000); Park Avenue Tower Associates v. City of New York, 746 F.2d 135 (2d Cir., 1984), cert. denied, sub nom. 40 Eastco v. City of New York, 470 U.S. 1087 (1985) (developer's profit expectations may be frustrated); William C. Haas & Co. v. City of San Francisco, 605 F.2d 1117 (9th Cir., 1979), cert. denied, 445 U.S. 928, reh. denied, 446 U.S. 929 (1980) (95% reduction in property value, from $2,000,000 to $100,000).

Accordingly, the lesser, but still substantial, reductions in property values resulting from laws requiring building

(Footnote Continued)

In light of the case law, it is clear that the instant complaint fails to state a claim. It does not allege that their properties as a whole have been rendered valueless by the City's asbestos laws and regulations, but merely that the value of their properties has been "substantially impair[ed] and diminish[ed]" because of the costs and obligations of asbestos abatement (A37). Such allegations are insufficient because they do not establish that petitioners have been deprived of economically viable use of their property.

(Footnote Continued)
owners to comply with new public health and safety measures have certainly not been found to constitute a taking. Queenside Hills Realty Co. v. Saxl, supra (cost of compliance equalling 30% of full market value of property); Tenement House Dept. of City of New York v. Moeschen, 179 N.Y. 325 (1904), aff'd, 203 U.S. 583 (1906) (cost of compliance equalling approximately 10% of property value).

Significantly, petitioners nowhere claim that they can no longer profitably operate their buildings for office space or otherwise. Absent such allegations, the complaint literally fails to state a claim "[b]ecause [the] test for regulatory takings requires [the court] to compare the value that has been taken from the property with the value that remains in the property...." Keystone, supra, 480 U.S. at 495, 497 (plaintiffs' burden of proving taking "especially steep" where they failed to claim that their mining operations, or any specific mine, had been unprofitable since the passage of the challenged law).

With respect to interference with any "distinct investment-backed expectations" (Pet., p. 11), it is clear that petitioners were, and are, not entitled to expect that their property could be operated indefinitely independent of future public health and

safety requirements. See, ante, pp. 24-35. Moreover, the City's asbestos removal laws and regulations do not prohibit what must be regarded as their primary expectation regarding the use of the property: the use of their buildings for office space. See Penn Central, supra, 438 U.S. at 136.

Unlike government regulations which prevent property from being used for its intended or desired purpose, the challenged laws and regulations merely condition their ability to alter portions of their buildings in compliance with certain public health and safety measures. Petitioners have it within their power to entirely avoid the costs and obligations associated with asbestos abatement, by foregoing any alteration work which would disturb "friable" asbestos. While painting and new carpeting alone might bring a less favorable rental than a complete renovation, it is clear that the City's

asbestos laws and regulations have not deprived these Manhattan office properties of any economically viable use.

In sum, petitioners have not and cannot meet their burden of showing that their property has been deprived of any economically viable use. At the most, they have alleged a "mere diminution" in their property value, which cannot establish a taking. Penn Central, supra. Petitioners have not been prevented from continuing to use their properties for their intended purpose -- office buildings -- much less been prevented from using their properties for any other economically viable use. Nor have they shown that their properties have been rendered valueless and cannot be sold, nor even that they are prevented them from operating their office buildings at a profit. Thus, the complaint fails to state a claim for

an unconstitutional taking as a matter of law.

3. A Variance Process is Available.

Petitioners' claim fails for one final reason. Although they do not acknowledge it (Pet., passim), there is available a variance provision, Local Law No. 46 of 1988. N.Y.C. Admin. Code, §24-146.1(i) ante, pp. 15-16. Over $40,000,000.00 of the alleged loss in petitioners' complaint are lost "future" costs and lost "future" rents (A35-A36, ¶¶35-37, see Pet., p. 4, n.3). In light of this variance process, petitioners' challenge is premature as to all those claims and is not ripe for review. Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172, 186 (1985). There, this Court reiterated that "a claim that the application of government regulations effects a taking of property interest is not ripe until the

government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." Id. at 186. See also Hodel v. Virginia Surface Mining and Reclamation Association, 452 U.S. 264, 294-295, 297 (1981); Agins v. Tiburon, 447 U.S. 255, 260-261 (1980); Willing v. Chicago Auditorium, 277 U.S. 274 (1928); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 384 (1926).

In conclusion, given the individual inquiry necessary in takings analysis, this Court adheres to the principle that "the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary." Pennell v. City of San Jose, supra, 485 U.S. at 9-10, 15. Thus, the instant case is not ripe for review.

For all the above reasons, the petition for a writ of certiorari should be denied.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

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Respectfully submitted,

VICTOR A. KOVNER,
Corporation Counsel of
the City of New York,
Attorney for Respondents.

LEONARD J. KOERNER,*
PAMELA SEIDER DOLGOW,
JULIAN BAZEL,
ELIZABETH S. NATRELLA,
of Counsel.

*Attorney of Record